ANALYSIS OF MASSACHUSETTS DELINQUENCY STATUTES

Governor's Anti-Crime Council

Juvenile Code Study and Revision Project

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PREFACE

The statutes contained in M.G.L. c. 18A, ss. 1-9, M.G.L. c. 119, ss. 52-84, and M.G.L. c. 120, ss. 1-26, provide for the regulation of delinquency proceedings, as well as agency responsibility for delinquent children.

The following material is comprised of a literal interpretation of these statutes together with a section by section commentary. The commentary points out language that is either inconsistent, redundant, irrelevant, or vague. These errors in draftsmanship lead to multiple interpretations of various sections. The judicial response to some of these issues is included in the commentary.

This material was compiled for distribution to serve as a base point for future discussion on the changes needed to construct a true "Juvenile Code" for Massachusetts.

Comments on the issues raised herein are welcome.

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PROVISIONS OF CHAPTER 119 OF JUVENILE CODE, WITH COMMENTARY

Chapter 119, Sec. 52:

This section defines three terms: "court," "delinquent child," and "probation officer."

A "court" is defined as a division of the juvenile court department or of the district court department. The juvenile court department consists of four juvenile courts, one each in Boston, Springfield, Worcester, and Bristol County. Excluded from this definition are those district courts in Worcester, Springfield, and Bristol County which have been replaced by juvenile courts in those locations.

A "delinquent child" is defined as any child "between seven and seventeen" who violates any city ordinance or town by law, or who violates a criminal law of the Commonwealth.

A "probation officer" is defined as a probation officer or assistant probation officer of the court "having jurisdiction over the pending case."

Comment: In the definition of delinquent child, the phrase "between seven and seventeen" is potentially misleading, since it can be read to include juveniles who are of age seventeen. A clearer definition might provide for jurisdiction over juveniles who are "at least seven but under seventeen years of age." This sort of definition would have the added advantage of clarifying whether a child comes within the jurisdiction of the delinquency code on his or her seventh or seventeenth birthday.

The definition of delinquent child might better be broken up into two definitions, one of a "juvenile" (person between seven and seventeen, etc.) and a second of a "delinquent juvenile" (a juvenile, already defined, who violates a city ordinance or town by law, etc.) This would alleviate the code's frequent references to a "child between seven and seventeen" who has not yet been adjudicated delinquent, and therefore does not fall under the existing definition of delinquent child. See e.g., Sec. 67 and the notice provisions pending arrest and detention contained therein.

The definition of court is unclear as to the separation of jurisdiction between the Boston Juvenile Court and the Municipal Courts within the City of Boston. A precise enumeration of the geographic area covered by Boston Juvenile Court is lacking in this section. It is therefore difficult to define the appropriate Municipal Court jurisdiction to be excluded. In the case of the Worcester, Springfield and the Bristol County Juvenile Courts it is clear that these courts have acquired jurisdiction over juveniles which was formerly lodged in the Central District Court of Worcester, the District Court of Springfield, and all four District Courts of Bristol County, respectively.

Chapter 119, Sec. 53

This section provides for the "liberal construction" of sections 52 to 63 of Ch. 119 so that the "care, custody and discipline" of juveniles brought before the court approximate as closely as possible that which they might receive from their own parents. The statute further provides that juveniles before the court should be treated not as criminals, but as "children in need of aid, encouragement and guidance," and that proceedings under these sections shall not be deemed criminal proceedings.

Comment: The impact of this section is primarily to emphasize that any ambiguities in the delinquency statutes should be resolved with regard to the parens patriae and rehabilitative character of the Massachusetts delinquency code. The language of this section has been unchanged since its enactment in 1906. It is not clear why the language of this statute excludes the remaining sections of Chapter 119 after section 63, from its stated purpose.

Notice that in confining itself to sections 52 to 63, this section makes only those sections of the delinquency code which deal exclusively with delinquency proceedings subject to the rule of liberal construction.

Sections of the delinquency code dealing with provisions common to all proceedings against children (sections 65 through 72A) and sections of the code dealing with criminal proceedings against children (sections 74 through 84) are not subject to the rule of liberal construction.

As originally enacted by St. 1906, c. 413, s. 2, this section provided that the rule of liberal construction would apply to the entirety of the act of St. 1906, c. 413. That act formed the basis of the present Ch. 119, sections 52 to 67, and 74. The Commissioners charged with the 1921 recodification and revision of the General Laws chose, for reasons that are not entirely clear, to have the rule of liberal construction apply only to sections 52 to 63.

Chapter 119, Sec. 54

This section governs the commencement of the complaint process and the manner of bringing the child before the court, whether by summons or warrant.

The section states that before a complaint can issue the complainant and any accompanying witnesses must be examined under oath, the complaint must be reduced to writing, and the complainant must subscribe to it.

If the child is under twelve, notification compelling attendance in court must be by summons. A child over twelve must be notified by summons unless the court has reason to believe that the child will not appear, in which case the court may issue a warrant. If any child has ignored a summons the court may issue a warrant.

Comment: The statute is subject to varying interpretations due to its attempt to regulate numerous situations in one sentence. Also, the statute is silent on the issue of warrantless arrests.

Ch. 119, Sec. 55

This section essentially provides for two things: First, that if a child is to be brought before the court, a summons shall issue for the appearance of at least one parent, the legal guardian, or the person with whom the child resides, if known; and second, that if the interests of the child require it, an agent of the Department of Youth Services shall attend "any proceedings" against such child in order to protect the child's interests.

Any parent or guardian who does appear is required to "show cause" why their child should not be adjudicated delinquent. The summons to child, parent or guardian must be served either in person, or by leaving it with a person of "proper age" at the recipient's address or place of business. If there is no such person available to be summoned then the court may appoint a "suitable person".

The summonsing of the parent or guardian must be fixed for the same time as the appearance of the child only "when practicable."

Comment: The section gives no indication as to how "impracticability" is to be determined in reference to the attendance of parents or guardians at the child's initial appearance before the court. By implication it allows for separate hearings for the child and for the parents or guardians to "show cause." It is also unclear as to how the statute intended a parent or guardian, who is not a material witness to the circumstances of the complaint, could "show cause why such child should not be adjudged a delinquent child."

Also, the statute only provides for a summons to a parent or parents who reside in Massachusetts. It is silent as to the notification of parents who reside outside of Massachusetts. This further raises the issue whether the court's discretionary authority to appoint a "suitable person" should be made mandatory.

The issue of requiring attendance by a parent or guardian at subsequent hearings of the juvenile is not regulated by this section or any other delinquency statute.

The parent is allowed the opportunity to be heard, but this section does not give the parent the authority to act for the child. Robinson v. Commonwealth, 242 Mass. 401, 136 N.E. 241 (1922).

Chapter 119, Sec. 55A

This section provides for a right to a jury trial in the first instance in a delinquency proceeding, and for waiver of that right subject to a de novo appeal.

Waiver of a jury trial in the first instance cannot be received unless the child is represented by counsel, or else has filed a written waiver of counsel through his or her parents or guardian.

Trials by jury in the first instance shall be in jury sessions designated by the administrative justices of the district courts and the juvenile courts, and all the rules and regulations relative to de novo appeals are also applicable to the jury trials in the first instance.

Comment: This two-tier system is exactly parallel in structure to that of the District and Municipal Courts for criminal cases: There is an option of a jury trial in the first instance or of a bench trial with rights of appeal to a jury trial. G.L., Ch. 218, Sec. 26A. The Supreme Judicial Court has held that the two tier system employed in the Boston Municipal Court and that of the delinquency code do not violate the double jeopardy clause of the United States Constitution. Commonwealth v. Lydon, 409 N.E. 2d 745, A Juvenile v. Commonwealth, 381 Mass. 379, 409 N.E. 2d 755, cert. denied, 449 U.S. 1062 (1980).

Perplexing problems can result from the language which requires a written waiver of counsel to be filed, by the juvenile "through" his parent or guardian, before a waiver of the right to a first instance jury trial can be accepted. Definition of the word through and its effect on a familial disagreement as to how to proceed could prove troublesome to the court.

Chapter 119, Sec. 56

This section provides for the adjournment of delinquency cases "from time to time," and specifies rules relating to de novo appeals of delinquency proceedings.

The first paragraph states that a juvenile may appeal to the jury session at the time of adjudication and of disposition, and he must be notified of this right at both stages. The statute specifies that the appeal, if taken, will be "determined in like manner as appeals in criminal cases," except that such appeals will be held in separate juvenile sessions apart from the other business of the district court. The statute also specifies that jurisdiction over the case, along with all the necessary papers, shall be transferred to the jury session.

The second paragraph states that if the allegations with respect to the child are proven the court can only make such disposition as is provided for in Sec. 58. Before making any disposition the court will be supplied with any investigation of the child made by the probation officer of the court from which the appeal was taken. Adult procedures relative to recognizance, as set out in G.L., Ch. 276 Sec. 35 and Ch. 278 Sec. 18, are applicable to juvenile cases that are continued or appealed.

The third paragraph deals mainly with technical matters of the appeals process. Provisions include:

-that, subject to the "foregoing limitations", a justice presiding over a juvenile jury session has the same powers and duties as a justice of the Superior Court department sitting in criminal session;
-that such a justice may not act in any case in which he was previously involved;
-that juvenile jury trials shall be governed by the same rules of law as are applicable for trial by jury in the superior court, except that the number of preemptory challenges is limited to two for each defendant. The Commonwealth is entitled to as many preemptory challenges as all the defendants in the case together are entitled to;
-that jurors will be selected from the pool of jurors available to the Superior Court;
-that trials will be by juries of six, except that in those cases where trial would be on an indictment if the child were an adult, the child is entitled to a jury of twelve (In adult criminal proceedings, the district and superior courts have concurrent jurisdiction over some offenses while other offenses, usually involving serious felonies, must be tried in Superior Court).

The fourth paragraph provides that the administrative justices of the District Court Department and the Juvenile Court Department will arrange for the sitting of jury sessions in their respective departments, and that they will assign justices to those jury sessions, "to the end that speedy trials may be provided for such appeals." Review of these jury sessions may be directly by the appeals court in the same manner as provided for the trial of criminal cases in the Superior Court. Review may be had by a bill of exceptions, appeal report, or "otherwise." Unlike the de novo appeal in the juvenile appeals session, this is a traditional appeal in which the Appeals Court reviews the propriety of the proceedings in juvenile session.

The third sentence of the fourth paragraph allows the juvenile to withdraw his or her claim to a jury trial. In this event the case is heard by a single justice of the juvenile appeals session, which results in a bench trial followed by a de novo bench trial in the juvenile appeals session. The juvenile may also withdraw his or her appeal entirely, in which event the case is returned to the original court for final disposition.

Chapter 119, Sec. 56 (con't.)

The last sentence of the fourth paragraph states that G.L., Ch. 218, Sec. 27A (h) applies to proceedings under this section. Ch. 218, Sec. 27A (h) provides that at a jury-of-six session the presiding justice will appoint a stenographer if requested to do so by the defendant. If a stenographer is appointed and either party requests a transcript of his notes, the stenographer will provide those notes to the requesting party at a rate fixed by the administrative justice.

Comment: The major defects of this section are that it tries to deal with too many provisions in any one paragraph and it includes some material that is inappropriately situated in this section. Paragraph #4 is particularly troublesome. The paragraph begins by dealing with a purely administrative matter albeit one which might be better situated in Ch. 218 of the General Laws. It then squeezes in a sentence on appeals to the Superior Court, reverts back to a discussion of the withdrawal of a claim to the juvenile appeals session, and finishes off with a reference to G.L., Ch. 218, Sec. 27A (h) without informing the reader that Sec. 27A (h) deals with the appointment of a stenographer, a heretofore wholly unrelated matter. From the point of view of good drafting, it might have been better to include the material on the withdrawal of de novo appeals after the first two paragraphs, which essentially discuss the right to such an appeal, and to put the material on appeals to the Superior Court and on the right to a stenographer in entirely separate paragraphs.

One technical problem with G.L., C. 218, Sec. 27A (h), is that it provides only for the presence of a stenographer and the acquisition of transcripts in jury sessions of six. A literal reading of the statute would suggest that if a juvenile case were appealed to a jury of twelve, the right to a stenographer and transcripts would be forfeited. It is unlikely that the drafters of the code intended such an aberration.

It appears that the possibility of appeal to the appellate session of the juvenile courts was inadvertently excluded from the language of the second sentence.

The appeal must be taken forthwith or it is deemed to be waived. Sylvester v. Commonwealth, 253 Mass. 244, 148 N.E. 449 (1925).

Chapter 119, Sec. 57

This section is a relatively straight forward recitation of some of the duties and responsibilities of a probation officer regarding children under the officer's jurisdiction. Provisions include:

(1) That the officer investigate "every case" of a delinquent child and make a report regarding the character of such child, including his school record, home surroundings, and any previous complaints against him;

(2) That in every case involving a child attending a "special class authorized by law," the officer will obtain a record of the child's performance from the Bureau of Special Education;

(3) That the officer be present in court during "trial," and that he furnish the court with information and assistance as required; and

(4) That at the end of the probation period he make a report as to the child's conduct.

Comments: The only problem with this statute is that some things are not defined as precisely as they could be. Thus "(e)very case of a delinquent child" presumably refers to every case in which a delinquency complaint has been sworn against a child. Also, what is the meaning, in the second sentence, of a "special class authorized by law?" Finally, while it is clear that the probation officer shall make various reports, it is not clear whether they are to be written or oral or for what purpose the reports are to be made. The language requiring the presence of the probation officer "at the trial of the case" leaves open for question his attendance at pre and post-trial hearings.

Ch. 119, Sec. 58

The first paragraph of this section provides that at the hearing of a complaint against a child the court "shall hear the testimony of any witnesses and take such evidence relative to the case as may be produced." If the allegations against the child are proved "beyond a reasonable doubt," the child may be adjudicated delinquent, or the court may continue the case without a finding and place the child on probation, as long as both the child and at least one of the parents or the legal guardian consent to this arrangement. The probation may include a requirement that the child "do work" or "participate in activities" as deemed appropriate by the court. The "work" or "activitities" that the court may order are presumably of the restitutionary and therapeutic variety.

The second paragraph provides that if a child is adjudged delinquent, dispositional alternatives include placing the case on file, placing the child in the care of a probation officer, or committing him to the custody of the Department of Youth Services. If a child is adjudged delinquent for a violation of a penal law, city ordinance, town by law or is a habitual school offender or truancy violator, the court may commit such child to the custody of the "Commissioner of Youth Services" and authorize him to place the child in the "charge of any person." Furthermore, if the child proves unmanageable," the Commissioner is authorized to transfer the child to "that facility or training school" which in his opinion best serves the needs of the child. Any commitment made by the Commissioner cannot be for a period of time longer than until the child turns eighteen. Finally, the Department of Youth Services is required to provide for the maintenance, in whole or in part, of any child placed in the charge of "any person."

The third paragraph provides in essence that when a child is placed on probation by a justice of the juvenile appeals session that child may be placed in the care of a probation officer from the judicial district in which the child resides. The significance of this paragraph is primarily that a child may be placed on probation in his home district even though the offense was committed, and the court taking initial jurisdiction was elsewhere.

Paragraph four provides that a court has the authority to commit a delinquent child to the Department of Youth Services, but it does not have the authority to commit a child to a jail, a house of correction, the Lyman School, the Industrial School for Boys, the Industrial School for Girls, or any other institution supported by the Commonwealth for "delinquent or wayward children or juvenile offenders."

The fifth paragraph provides for renumeration by the child's parents or guardian from the child's property or by any other person responsible for the care of the child, to the "institution, department, division, organization or person furnishing care and support." An order of support cannot exceed the actual cost of the services, and it can only be made after the person who is to make the payments has been summoned and given an opportunity to be heard. The court has the discretion to review and revise any support order from time to time.

Ch. 119, Sec. 58 (con't)

Comment: This section has a number of deficiencies which make it suitable for substantial redrafting. These deficiencies include the repeated mention of institutions and categories of offenders which no longer exist, some redundancies and ambiguities, and some statements which appear to be self-contradictory.

The following outcated terms need to be deleted from this section:

In paragraph #2, the references to "habitual school offenders" and "truancy violators" need to be deleted since this category of offenses is now governed by the Children In Need of Services statute. Also the reference to "training schools" needs to be deleted since these institutions no longer exist.

In paragraph #4, the references to the "Lyman School," the "Industrial School for Boys," and the "Industrial School for Girls" need to be deleted since these institutions no longer exist.

Also in paragraph #4, the reference to "wayward children" needs to be deleted since the definition of waywardness has been eliminated from the juvenile code.

Conceptually, this section could be better organized. The section tries to digest a large amount of materials in one place, and breaking some of this material into separate sections might improve its accessibility. The first paragraph includes information both on the mechanics of an adjudicatory hearing and on dispositional alternatives if the case is continued without a finding. The second paragraph includes material on dispositional alternatives open to the court along with material on the authority of the Commissioner to place and transfer a committed child. The fourth paragraph contains limitations on the Court's authority to make dispositions. A different organizational scheme might look like this:

-a first paragraph on the mechanics of an adjudicatory hearing, including such issues as who may testify, and what nature of evidence will be allowed;

-a second paragraph on the range of findings and dispositional alternatives open to the Court, along with any limitations;

-a third paragraph on the mechanics of probation; and,

-a fourth paragraph on the authority of the Department of Youth Services to place and transfer children committed to its custody;

-a fifth paragraph on payments by the parent or guardian to the caretaking agency.

Other deficiencies in the statute include the following:

The second sentence of paragraph #2 substantially reiterates the definition of a "delinquent child" after the preceding sentence has already clearly indicated that the subject matter under discussion is dispositional alternatives for children adjudicated delinquent.

When that same sentence authorizes the Commissioner to place the child in the charge of "any person," that term is insufficiently defined. Presumably it refers to the entire spectrum of service providers that D.Y.S. contracts with. These might be individuals or agencies, ranging from foster care to boarding schools to secure treatment facilities.

The language of paragraph #3, limits itself to situations in which a child is adjudged delinquent in the juvenile appeals session. If a child opts for a bench trial in the first instance, and is put on probation by a judge of a juvenile court outside the district in which he resides, the language of this section suggests that that judge does not have the discretion to place the child in the care of a probation

Ch. 119, Sec. 58 (con't)

officer of the district in which the child resides. It seems doubtful that the drafters intended such a result.

The construction of the first sentence of paragraph #5 could be interpreted to mean that when the parent or guardian of a child is ordered to make payments it must be "from the child's property," whereas in the case of "any other person" no such limitations apply. A more plausible interpretation, which limits payments to the child's property only in the case of a guardian, results if a comma were to be inserted after "parents".

One issue which is not solely specific to Section 58, but which is best addressed at this juncture, is the policy of the delinquency code that no juvenile be committed to any kind of adult correctional facility until or unless he has been convicted of a crime as an adult. Statements regarding that issue surface in different parts of the code, including Sections 58, 58B, 66, 67, 68, and 68B. From the point of view of drafting, it might make more sense to have just two sections to deal with this issue, one dealing with commitment, and one dealing with detention. The detention section would then enumerate any specific police station exceptions to the policy.

Ideally, the maximum limits of an initial commitment to D.Y.S., as provided for in Ch. 120, Sec. 16, should be included in this section.

Ch. 119, Sec. 58B

This section provides additional rules regarding children adjudged delinquent for having committed any offense related to motor vehicles. The statute provides that if a child is adjudicated delinquent because of some violation of a motor vehicle statute, ordinance, regulation or by-law, the court may place the case on file, place the child on probation, or commit him to the custody of D.Y.S. Additionally, the court may require restitution as provided by Sec. 62 of this Chapter, and/or the court may impose a fine not exceeding the amount authorized by the motor vehicle statute, ordinance, regulation or by-law. The statute further provides that any fine imposed will be collected in the same manner as provided for by G.L., c. 279 ("Judgement and Execution") and Ch. 280 ("Fines and Forfeitures") except that if the child fails or refuses to pay the fine, he can be arrested upon an order of the court and subsequently placed in the care of a probation officer or committed to D.Y.S. Under no circumstances may a child so adjudicated be committed to a jail or a house of correction.

The provisions of sections 60 and 60A of this Chapter are applicable to any case disposed of under this section, except as provided. Sections 60 and 60A govern the admissibility of a delinquency adjudication in subsequent proceedings and the inspection of records in delinquency cases. The exceptions, as provided by this section, are listed below:

The court shall provide the Registrar of Motor Vehicles with an abstract of any adjudication and disposition arising under this section in the manner provided for by G.L., Ch. 90, Sec. 27 ("Court records involving violations of laws relating to operation of Motor Vehicles");

The "adjudication and disposition" is admissible into evidence in any proceeding for the restoration or revocation of the child's driver's license, or cancellation of a car insurance policy covering the child;

The "adjudication and disposition" is admissible into evidence in any tort arising out of the negligent operation of the vehicle by the child to the same extent that such evidence would be admissible if the child were an adult.

Comment: Conceptually, it might be useful to separate the material on the admissibility and inspection of delinquency records from the preceding material on fines, penalties, and other disposition. Simply making the admissibility and inspection material into a second paragraph might help.

It is interesting to note that the dispositional option of continuing a case without a finding is excluded from this section. This creates an obvious conflict with the provisions of Section 58. Additionally, there is no obvious need here to reiterate the general rule that no child may be committed to a jail or a house of correction.

Ch. 119, Sec. 59

This section deals with violations of the terms of probation. The section provides essentially for two things: First, that once the child has been placed on probation the probation officer may arrest the child without a warrant, or the court may issue a warrant for his arrest; and second, once the child is before the Court, the Court may make any disposition of the case it could have made before the child was placed on probation, including continuing or extending the period of probation.

Comment: This section fails to establish explicit standards for what sort of acts or omissions may trigger the juvenile's arrest. Presumably any violation of the terms of probation could trigger the arrest. This presumption should be made explicit.

This section also fails to set rules to be followed in a hearing to determine whether a probationer has violated his conditions of probation. These rules would insure the adequate protection of due process rights.

Ch. 119, Sec. 60

This section deals with the admissibility of delinquency adjudications as evidence in subsequent court proceedings, and the issue of disqualification for public service. The section provides that an adjudication or disposition under sections 52 to 59, or any evidence given in any case arising under those sections, is not proper evidence against such child for "any purpose" in "any proceeding" in "any court", and that records arising from such proceedings shall not be received in any court or "used in any way in any such proceeding," except in the case of the following enumerated exceptions:

(1) in subsequent proceedings for delinquency against the same child; and,

(2) in imposing sentence in any criminal proceeding against the same person (regardless of the present age of that person).

The section then goes on to provide that no such adjudication or disposition or evidence shall operate to disqualify a juvenile in any future examination, appointment, or application for public service in the Commonwealth, or any political subdivision thereof.

Comment: As a conceptual matter, it would have been better to include the material on disqualification from public service in a separate paragraph.

The all-encompassing character of the language on excluding past delinquency records from being used in any proceeding is not borne out by recent Massachusetts case law. An exception is a juvenile record which may be used to impeach a witness when it is relevant to the issue of bias. Commonwealth v. A Juvenile (No. 2), 384 Mass. 390, 425 N.E.2d 294, 297 (1981). Impeachment through the introduction of a prior juvenile record is permissible particularly when the witness in question is still on probation, and has a strong motive to fabricate so as to stay out of trouble and please the prosecution. Davis v. Alaska, 415 U.S. 308 (1974), Commonwealth v. Ferrara, 368 Mass. 182, 330 N.E.2d 837 (1975). From a drafting point of view, it might be wise to recognize certain constitutional limitations on the doctrine that a juvenile's record may not be used in any subsequent proceedings, and to define those limitations as accurately as possible.

A further exception is the admissibility of a delinquency record at a subsequent hearing to determine if the juvenile is sexually dangerous. Commonwealth v. Rodriguez, 376 Mass. 632, 302 N.E.2d 725 (1978).

Ch. 119, Sec. 60A

Section 60A provides that court records in delinquency proceedings, including those of the juvenile appeals session, shall be withheld from public inspection unless a justice of "such court" consents. However, the records of a particular child shall be available for inspection at "all reasonable times" to the child, his or her parent or parents, guardian and attorney, or any of them.

Comment: This is basically a well-drafted section. The only real question here is whether it would be worthwhile to propose any standards which could guide a justice in making the decision on whether to open the juvenile records to public inspection.

Ch. 119, Sec. 61

Section 61 is essentially the transfer statute of the delinquency code, and it provides as follows.

Paragraph #1 allows for a transfer hearing and subsequent dismissal of the juvenile complaint under the following circumstances:
(1) that the alleged offense was committed while the juvenile was between his fourteenth and seventeenth birthdays; and,
(2) that the alleged offender had previously been committed to D.Y.S. as a delinquent child, and that the alleged offense is one that, were he an adult, would be punishable by imprisonment in the state prison; or,
(2a) that the alleged offense involved the infliction or threat of serious bodily harm.

If conditions (1) and (2) or (2a) have been met, then the court must still enter a written finding, based upon clear and convincing evidence, that:

(1) the juvenile presents a significant danger to the public as demonstrated by (a) the nature of the offense charged and (b) the child's record of past delinquent behavior, if any; and,

(2) the juvenile is not amenable to rehabilitation as a juvenile.

Paragraph #2 states that the transfer hearing will be held before any hearing on the merits of the charges alleged, and that the court shall make a determination as to probable cause. If the Court finds probable cause then, in considering the transfer, the Court shall consider (but shall not be limited to) evidence of the five following factors:

(a) the seriousness of the alleged offense;
(b) the child's family, school and social history, including his court and juvenile delinquency record, if any;
(c) the adequate protection of the public;
(d) the nature of any past treatment efforts for the child; and,
(e) the likelihood of rehabilitation of the child.

Paragraph #3 provides that if the Court determines that the child should continue to be treated as a delinquent child, and if a motion is made on behalf of the child, the Court shall continue the case until such further time as it shall determine.

Paragraph #4 provides that if the delinquency complaint is dismissed a criminal complaint shall be issued, and the case will proceed according to the usual course of criminal proceedings, and in accordance with the provisions of G.L., Ch. 218, Sec. 30 ("Binding over to Superior Court") and Ch. 278, Sec. 18 ("Appeals in criminal cases to jury-of-six sessions; Recognizance"). In the case that a criminal complaint issues, Section 68 shall apply to any person committed under this section for failure to recognize pending final disposition in the Superior Court.

Paragraph #5 provides that the judge who conducted the transfer hearing is disallowed from conducting any subsequent hearing arising out of the facts alleged in the delinquency complaint, unless the juvenile waives this provision through his or her counsel.

Ch. 119, Sec. 61 (con't)

Comment: There are some important constitutional issues that are raised by a bifurcated transfer system such as is constructed in Section 61. The Supreme Judicial Court has upheld section 61 against constitutional challenges that it violated double jeopardy, Stokes v. Commonwealth, 368 Mass. 754, 336 N.E.2d 735 (1975), due process, Commonwealth v. Clark, 379 Mass. 623, 400 N.E.2d 251 (1980), the ex post facto clause, Stokes, supra, and that it was void for vagueness, In re Juvenile, 364 Mass. 531, 306 N.E.2d 822 (1974). As a practical matter, the only serious constitutional issue which is raised by a bifurcated transfer system is whether that system violates double jeopardy, and that is because the Supreme Court ruled in 1975 that a juvenile system which allowed that a delinquency adjudication may be followed by a transfer hearing to the criminal courts violated the double jeopardy clause because it forced the defendant to defend himself twice (once in the juvenile courts and once in the criminal courts) against charges arising out of the same activities. This problem is not at hand under a system structured as section 61 is, with the transfer hearing occuring before the delinquency proceeding or criminal trial, because a defendant does not need to "defend" himself at a transfer hearing, and therefore jeopardy does not attach. In theory a transfer hearing functions just as a probable cause determination does on the adult criminal level. Notice that the Supreme Court did not mandate that the transfer hearing and the determination of probable cause occur simultaneously, Breed, 421 U.S. at 536, n. 16. Some commentators have suggested that it might be expedient to bifurcate the transfer hearing itself into two components, the first dealing with probable cause and the second dealing with the propriety of transfer. The advantage of such a bifurcation might be that it would expedite the transfer procedure in that where no probable cause is found, there would be no need to evaluate the propriety of transfer.

A second aspect of section 61 which has been subject to judicial scrutiny and interpretation is the relationship of the findings required under paragraph #1 of the section to the considerations required by paragraph #2 of the section. On its face the section is not clear on whether the considerations demanded by paragraph #2 are subsidiary to or in addition to the findings demanded by paragraph #1. The Supreme Judicial Court has held that the considerations (a) through (e) required by paragraph #2 are subsidiary to the specific findings required by paragraph #1, and are to be used as a guide in deciding whether the juvenile is a danger to the public and whether he is amenable to rehabilitation. A Juvenile v. Commonwealth, 370 Mass. 272, 347 N.E.2d 677 (1976). However, the Supreme Judicial Court does not require a "checklist" approach, with a specific written finding on each of the enumerated considerations (a) through (e). Two Juveniles v. Commonwealth, 381 Mass. 736, 412 N.E.2d 344 (1980). What the justices do require is specific written findings on whether the child presents a danger to the public and whether he is amenable to rehabilitation, and subsidiary written findings indicating the basis for this conclusion. These subsidiary written findings should be grounded in the considerations (a) through (e) of paragraph #2. Id. The justices also require that the legislative policy favoring the non-criminal treatment of juveniles be regarded, that the transfer be warranted by exceptional circumstances only, and that transfer decisions not be predicated exclusively on findings dealing with the seriousness of the crime and the inadequacies of juvenile facilities in terms of safeguarding the public. A Juvenile v. Commonwealth, 380 Mass. 552, 405 N.E.2d 143 (1980). From the point of view of how section 61 is drafted or redrafted, the primary concern is to make sure that it is clear which specific findings are mandated and which findings are subsidiary considerations, if any. As a practical matter, the first two paragraphs of section 61 are fairly well drafted, and in conjunction with the interpretive Supreme Judicial Court cases, the whole system appears to function quite well.

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Paragraph #4 is not as clear as it could be about which court is the proper venue for criminal proceedings after a transfer hearing has been held and the juvenile complaint dismissed. In practice all transferred cases go to the Superior Court, and the weight of the statutory language certainly supports this practice. However, the first sentence of paragraph #4 states, "(i)f the court orders the delinquency complaint against a child be dismissed it shall cause to be issued a criminal complaint." Thus the District Court, which hears the transfer, also issues the criminal complaint. The second sentence of paragraph #4 provides that "(t)he case shall thereafter proceed according to the usual course of criminal proceedings and in accordance with the provisions of section thirty of chapter two hundred and eighteen...." This sentence proves to be somewhat vague since the "usual" course of criminal proceedings is to allow both district courts and superior courts to hear criminal cases depending on the nature of the charge, while G.L. Ch. 218, sec. 30 clearly states, "(t)hey shall commit or bind over for trial in the superior court persons brought before them who appear to be guilty of crimes not within their final jurisdiction, and may so commit or bind over persons....who appear to be guilty of crimes within their final jurisdiction." Also, the last sentence of paragraph #4 speaks of the consequences of failing to recognize "pending final disposition in the superior court."

The matter was temporarily settled by the Supreme Judicial Court's decision in In re Juvenile, 364 Mass. 531, 306 N.E.2d 822 (1974), wherein the Court held that a District Court did not have the jurisdiction to try a juvenile on a criminal complaint. That decision, however, was predicated largely on the language of section 75 of Ch. 119 which has since been repealed. Much of the old material of the now-repealed section 75 was inserted into section 61 by St. 1975, c. 840, but the new language in section 61 is by no means identical to the language in the old section 75. The current interpretation and practice does not appear to be in compliance with the "liberal construction" mandate of Section 53. The issue, from the point of view of legislative drafting, is simply that the section could state clearly that all juvenile cases which are appropriate for transfer will proceed in the Superior Court. One conceptual issue that must also be addressed is what are the relative advantages and disadvantages of limiting jurisdictions over juveniles in criminal proceedings to the Superior Court.

The last sentence of paragraph #4 is deficient in several ways. It refers to "section 68" without specifying which chapter of the General Laws is meant. The presumption is that it is Ch. 119. Also, the term "failure to recognize" is ambiguous in some way. "Recognizance" has not been defined anywhere in the juvenile code. Black's Law Dictionary defines it as follows:

> "An obligation undertaken by a person, generally a defendant in a criminal case, to appear in court on a particular day or to keep the peace."

"Failure to recognize" would therefore be a failure to appear in court at the appointed time. Since section 68 deals with the commitment of juveniles held for examination, trial, continuance or indictment, it seems likely that what is meant is that the bail provisions of section 68 apply.

In paragraph #5 it is unclear why the child can waive the protections of that paragraph only when represented by counsel. A child can waive his right to a jury trial under section 55A by filing, through his parent or guardian, a written waiver of counsel. Moreover, it might be more appropriate in either case to allow the child to waive both rights simply by filing a written waiver of the right through his parents or guardian.

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The provisions of paragraph #5 appear to be at odds with the provisions of paragraph #4. As discussed, paragraph #4 seems to require that any criminal cases be prosecuted against juveniles in Superior Court. Paragraph #5 seems to provide that when the juvenile defendant permits it, the same judge who heard the transfer hearing may also hear the criminal trial. But the judge who holds the transfer hearing will in all cases be a judge of the juvenile or district courts.

At the transfer hearing, the admissibility of hearsay evidence is governed by "fundamental fairness" and not the rules of evidence. Commonwealth v. Watson, 388 Mass. 536, 467 N.E.2d 1182 (1983).

Ch. 119, Sec. 62

This section provides for restitution or reparation by juveniles in certain cases. If a juvenile has been adjudicated delinquent and placed on probation, and the Court has found that an "element" of the delinquency was that the juvenile committed acts that subject him to civil liability, the Court can order, as a condition of probation, that he make restitution or reparation to such extent as the Court determines. If a payment is not made at once then it must be made to a probation officer, who pays the money to the injured person, and who keeps records and receipts of the transactions.

Comment: One substantive issue that this section raises is whether restitution and reparations should be allowed only in cases of probation.

The second sentence of this section provides that "(i)f the payment is not made at once, it shall be made to the probation officer...." The implication is that payments to the probation officer may be made in installments. If this is so, the implication needs to be made explicit.

Ch. 119, Sec. 63

Section 63 establishes the offense of inducing or abetting the delinquency of a child. It applies to "any person" who is found to have "caused, induced, abetted, or encouraged or contributed toward the waywardness or delinquency of a child, or to have acted in any way tending to cause or induce such waywardness or delinquency." Violations may be punished by a fine of not more than $500 or by imprisonment of not more than a year, or both. The statute then enumerates three additional sentencing options, which are:

(1) that the defendant may be released on probation in accordance with G.L. C. 276, sec. 87, and such orders as the Court may make as to future conduct on the part of the defendant which may cause or induce delinquency;

(2) that the defendant's sentence may be suspended in accordance with the provisions of G.L. C. 279, sec. 1;

(3) that the defendant may recognize to the Court in such penal sum as the Court may fix, on condition that he comply with such terms as the Court may order for the welfare of the child, and the case may be placed on file.

The provisions of section 56 as to appeal and recognizance are applicable to cases arising under this section. The Boston Juvenile Court has original jurisdiction over complaints arising under this section. The Worcester, Springfield, and Bristol County Juvenile Courts have concurrent jurisdiction over cases arising under this section with the district courts with which they share territorial jurisdiction (e.g., the Central District Court of Worcester, etc.).

Comment: Notice that the provisions of this section apply to both adults and juveniles, and that a juvenile can be adjudicated delinquent for having induced or abetted the delinquency of another juvenile. Commonwealth v. Bigwood, 334 Mass. 46, 133 N.E.2d 585 (1956).

The section subjects adults only to the jurisdiction of the juvenile sessions in those territorial areas (Boston, Worcester, Springfield, and Bristol County) where juvenile courts exist separately from the district courts. There are no special provisions in the statute subjecting adults to the jurisdiction of the juvenile sessions of the remaining district courts. Yet, the use of the word "court" as defined in section 62, includes juvenile sessions of the district courts. Obviously, a clearer delineation of the courts having jurisdiction is required.

There is some question as to whether this whole section might not be more appropriate in the general criminal code. The apparent rationale for including this section under the juvenile code is to protect the child, to whose delinquency the offender contributed, from adverse publicity. This aim might be better accomplished by simply providing that prosecutions for this offense will be held in closed sessions of the district courts.

The second sentence of this section fails to establish gramatically that the defendant is the subject of the sentence. It states, "(t)he court may release on probation..." without ever establishing who may be released on probation. In short, the sentence needs to include its subject.

The third sentence provides that provisions for "appeal and recognizance" are governed by sec. 56 (assumably of c. 119). While sec. 56 has specific provisions for appeal, its provisions for recognizance consist largely of a reference to two adult statutes. From a drafting point of view it might be better to reference the appropriate adult statutes directly.

Ch. 119, Sec. 63 (con't)

In the first sentence, the two references to "waywardness" are inappropriate, since "waywardness" has been deleted from the definitions of the delinquency code.

Ch. 119, Sec. 64

Section 64 provides that the Commissioner of Probation may supervise the probation work for wayward and delinquent children, that he may make necessary inquiries about their probation work, and that he may make recommendations for improving the methods of dealing with such children in his annual report.

Comment: The reference to "wayward" children is inappropriate. It is unclear what is meant by probation "work". The assumption is that it refers to the "work" of juvenile probation officers. If this is the case, it should be so stated.

Also, there is some question as to whether this section is necessary at all. Does it designate some authority to the Commissioner of Probation that he does not already have?

Ch. 119, Sec. 65

Section 65 is the "closed door" section of the juvenile code. It provides that Courts shall designate suitable times for the hearing of juvenile cases, which shall be called the "juvenile sessions," and for which a separate docket and record shall be kept. Juvenile sessions shall be separate from criminal sessions, they shall not, except as otherwise expressly provided, be held in conjunction with other business of the court, and they shall be held in rooms not used for criminal trials. In places where no separate juvenile courtrooms are provided, juvenile sessions, so far as possible, will be held in chambers.

The section goes on to provide that no minor will be allowed to be present at a juvenile session unless his presence is necessary as a party or a witness, and that the general public shall be excluded from the room except for persons who have a "direct interest" in the case.

Finally, a complaint under "section sixty-three" "may" be heard in juvenile sessions.

Comment: The definition of "juvenile sessions" might be better situated in the definitional section, Ch. 119, sec. 52.

The reference to "section sixty-three" should specify section 63 of Ch. 119.

Otherwise, this is a clear and well-drafted section.

Ch. 119, Sec. 66

Section 66 functions together with sections 67 and 68 to provide for and place limits on the detention of juveniles by the police and the courts, prior to the final disposition of juvenile cases. The first sentence of sec. 66 provides that, except as otherwise provided by sec. 67 and by sec. 12 of Ch. 120, no juvenile under seventeen can be detained by the police in a lockup, police station or house of detention pending arraignment, examination or trial. (Sec. 67 essentially provides for detention after arrest by the police in D.Y.S. approved police facilities, town lockups, or detention homes.)

The second sentence of sec. 66 provides that, except as otherwise provided by sec. 68, no juvenile under seventeen may be detained by the Court in a jail, a house of correction, or the state farm while awaiting further examination, trial, continuance, or an appeal to the Superior Court, or upon adjudication as a delinquent child.

Comment: From an organizational standpoint, it might be better to have the material from sec. 66 integrated with the material from sec. 67 and 68. Sec. 67 deals generally with the power of the police to detain juveniles (as does the first sentence of sec. 66), and sec. 68 deals generally with the powers of the Court to order the detention of juveniles (as does the second sentence of sec. 66). More importantly, sec. 67 almost completely vitiates the impact of the first sentence of sec. 66, since it allows for detention of juveniles in both police stations and town lockups as long as they have been D.Y.S. approved.

It is not clear what the first sentence of sec. 66 is referring to when it prohibits lockups of juveniles in a "house of detention." Probably this is a reference to detention facilities in a house of correction.

There is nothing in G.L. C. 120, sec. 12, that serves as an exception to the general prohibitions of the first sentence of sec. 66. G.L. C. 120, sec. 12 is concerned with the parole of juveniles and their placement within their own families, foster families or foster homes.

The reference in the title and second sentence of sec. 66 to "state farm" is obsolete since this institution no longer exist. Also, the second half of the title (after the semi-colon) would be more accurate if it emphasized the prohibition on "commitment to jail, house of correction, or state farm."

Sec. 68 does not provide an exception to the rule that no juvenile will be commited by the Court to a jail or house of correction, as the second sentence of sec. 66 seems to indicate. Although there is some confusing language in the third paragraph of sec. 68, with its apparently inadvertent reference to "jail" (see discussion of sec. 68, infra), the Supreme Judicial Court and the Attorney General of Massachusetts have been unanimous in holding that sec. 68 does not allow for the commitment or detention of a juvenile to a jail or house of correction. Rambert v. Commonwealth, 389 Mass. 771, 452 N.E.2d 222 (1983), Op.Atty.Gen., April 11, 1973, p. 94.

Ch. 119, Sec. 67

This is something of a catchall section covering notice of arrest, detention pending inquiry, and release.

The first sentence provides that whenever a juvenile has been arrested with or without a warrant, the officer in charge of the police station or town lockup must notify each of the following people:
(a) the probation officer of the judicial district in which the juvenile was arrested; and, (b) at least one of the juvenile's parents, or his or her guardian, or the person "with whom it is stated that such child resides." The officer in charge is also required to inquire into the case.

The second sentence provides that pending such notice and inquiry, the child shall be detained.

The third sentence provides that the juvenile may be released under two conditions: (a) upon the acceptance by the officer in charge of a written promise from a parent, guardian, or "any other reputable person"; or (b) upon a request by the probation officer to the officer in charge to release the arrested juvenile to the probation officer's custody. However, release of a juvenile between 14 and 17 years of age can be precluded under the following conditions: (a) that the arresting officer requests in writing that the juvenile be detained; (b) that the Court issuing an arrest warrant directs that the juvenile be "held in safekeeping" pending his or her appearance in court; or (c) that the probation officer directs that the juvenile shall be detained. If the child is detained it will be in a police station, town lockup, D.Y.S. detention home, or any other home approved of by D.Y.S.

The fourth sentence provides that in the event that the child is detained at the request of the arresting officer, the probation officer, or the Court, the officer in charge at the police station or town lockup shall notify the probation officer, parents, guardian, or person with whom the child resides, of the child's detention.

The fifth sentence provides that nothing contained in section 67 shall prevent the admitting of a child to bail in accordance with law.

The sixth sentence provides that the probation officer or officer in charge at the police station or town lockup shall notify the child, his or her parents, the guardian, or the person with whom the child resides of the time and place of the initial hearing.

The seventh sentence provides that no juvenile can be detained at a police station or town lockup unless that facility has received the written approval of the Commissioner of Youth Services.

The eighth sentence provides that D.Y.S. must make annual inspections of police stations and town lockups wherein children are detained.

The ninth sentence provides that if a particular city or town does not have any D.Y.S. approved lockup facilities, it may contract with an adjacent city or town for the use of approved detention facilities "in order to prevent children who are detained from coming into contact with adult prisoners."

The tenth sentence provides that nothing in this section shall permit that a juvenile be detained in a jail or house of correction.

Ch. 119, Sec. 67 (con't)

The eleventh sentence provides that all police stations, town lockups or "places of detention" shall provide separate and distinct places for the detention of juveniles.

Comment: This section could benefit from substantial redrafting. It is not well organized, and it inserts too much material into one unbroken paragraph. Some of the language is ambiguous, and much of it is awkward and archaic.

Organizationally, this section would be better if broken up into at least three paragraphs. The first paragraph would deal with the provisions for notice and detention immediately following arrest. The second paragraph would deal with the procedures for release or continued detention, and the appropriate notice requirements in the case of continued detention. The third paragraph would deal with D.Y.S. certification and inspection of local detention facilities.

In enumerating the three ways in which continued detention can be obtained, the Code states that it can be at the written request of the arresting officer, and if the Court so directs in the arrest warrant, or if detention is requested by the probation officer. It seems likely that the "and" here should be an "or". It would be unusual to require that an arresting officer file a written request for detention if the Court has already directed that the child be detained in its issuing warrant.

The phrase, in the third sentence, which reads, "place of temporary custody commonly referred to as a detention home of the department of youth services," should be changed simply to a "detention home of the Department of Youth Services."

In the fourth sentence, the phrasing of that sentence makes it appear that notification of continued detention is required only in those cases where the child is detained at a police station or in a town lockup, but not when the child is detained in a detention home or some other D.Y.S. approved facility.

The placement of the sixth sentence makes it appear as though notice of the time and place of the hearing is required only in the case of continued detention, and not in all cases of arrest. This sentence would be much better if it were included with the initial material of this section on notice immediately following arrest.

The section fails to provide for the procedure to be followed in the case of a child under fourteen who is not released to a parent, parent substitute or probation officer as contemplated.

Ch. 119, Sec. 68

This section provides for commitment of juveniles held for examination or trial, for the precedence of cases involving juveniles, and for the powers of a probation officer.

Paragraph #1 provides that a juvenile held for further examination, for a delinquency hearing or continuance, for an indictment and criminal trial (under sections 73 to 83 of this chapter), or for an appeal to the juvenile appeals session, if unable to furnish bail, shall be committed by the Court to one of the following: (1) the Department of Youth Services; (2) a probation officer; or (3) a parent, guardian, or "other person who shall provide for his safekeeping." The paragraph goes on to provide that the appearance of the child at the examination, trial, or appeal is the "responsibility" of the Court.

Paragraph #2 provides that D.Y.S. may provide special foster homes or detention homes for juveniles committed to its custody, but that in the special foster homes, no more than five children may be detained in each home at any one time.

Paragraph #3 provides that juveniles who have been committed by the Court pending further examination, trial, or juvenile appeals, must be returned to the Court within fifteen days of the order of commitment for final disposition, unless in the opinion of the Court, the interests of the child and the public require otherwise.

Paragraph #4 states that the provisions of G.L. Ch. 212, sec. 24, regarding the precedence of cases, shall apply to two categories of juveniles: (1) those juveniles held in detention by D.Y.S. who are prosecuting an appeal to the juvenile appeals session; and (2) those juveniles held for indictment and criminal trial under the provisions of sections 72A to 83 of this chapter.

Paragraph #5 states that a probation officer has the same authority, rights, and powers in regard to a child committed to his care (under this section and sec. 67) as he would have if he were the "surety on the recognizance of such child."

Comment: The provisions regarding the precedence of cases and the powers of a probation officer might be better separated from this material and placed in another section.

The reference to "section 73" in the first paragraph of this section is inappropriate since that section has been repealed since 1964.

In the first sentence of the first paragraph, the phrase "further examination, trial or continuance, of for indictment and trial under the provisions of sections seventy-three to eighty-three" is confusing, particularly because of its use of "trial" here denotes a delinquency hearing. By contrast a "trial under the provisions of sections seventy-three to eighty-three" denotes a criminal trial in the superior court. A better choice of words might substitute "delinquency hearing" for trial, so that the whole phrase would read, "further examination, delinquency hearing or continuance, or for indictment and trial under the provisions of sections seventy-three to eighty-three

It might be useful to have the terms "detention home" and "special foster home" defined in the definitional section of this chapter. The phrase "places of temporary custody commonly referred to as detention homes" is unnecessarily awkward.

Ch. 119, Sec. 68 (con't)

The references in paragraph #3 to "jail" and the "Youth Service Board" are inappropriate, since the Youth Services Board no longer exists, and since there is nothing in any other part of the delinquency code which permits detention of a child in jail, and many parts which expressly prohibit it. See Rambert v. Commonwealth, 389 Mass. 771, 452 N.E.2d 222 (1983), Op.Atty.Gen., April 11, 1973, p. 94.

The section of paragraph #3 listing all the juvenile courts seems unnecessary and redundant. The recitation essentially only repeats the definition of "court" from sec. 52.

In paragraph #5, dealing with the powers of a probation officer, it is not crystal clear what the phrase "as he would have if he were surety on the recognizance of such child" really means. The exact powers of the probation officer could be spelled out with greater clarity.

There is a total lack of standards and procedure to be adhered to in setting bail, in this and all other sections. Clearly, this is an area of significant importance, and one that must be fully addressed in the juvenile code, and not just in the rules of the court as is presently the case.

Ch. 119, Sec. 68A

Section 68A provides for diagnostic study of juveniles.

The section states that a juvenile held by the Court for further examination, trial, continuance, juvenile appeals, or indictment and criminal trial (under the provisions of sections 73 to 83) may, at the discretion of the Court, be referred to either (1) D.Y.S., (2) any court clinic, or (3) D.M.H. for a diagnostic study on an inpatient of outpatient basis. If referred to D.M.H., that agency has to consent to the referral. The parents or guardian have to consent in any case. At the conclusion of the diagnostic study, the agency to which the child was referred must forward a report and recommendation to the Court. If the child is "in default of bail" he or she may be committed to D.Y.S. for diagnostic study for a period not to exceed thirty days, at the expiration of which the child must be returned to the Court, together with a report and the recommendation of D.Y.S.

Comment: The title to this section, "(d)iagnostic study by the department of youth services," is misleading in view of the fact that diagnostic study may also be performed by a court clinic or the Department of Mental Health.

As with sec. 68, the reference to "section seventy-three" is inappropriate since that section has been repealed.

It is unclear whose consent is required by the use of the phrase "with its consent" in the fifth line of the section. The consent required could be that of the child, that of the Department of Mental Health, or that of either the Department of Youth Services, any court clinic, or the Department of Mental Health. The confusion is magnified by the statutory history of the section. As enacted by St. 1955, c. 609, the section provided that a child held for further examination, etc., could be referred to the Youth Service Board for diagnostic study with its consent. The consenting party in this case was clearly the Youth Service Board. St. 1969, c. 838, s. 19 substituted, inter alia, "department of youth services, any court clinic, or department of mental health" for "youth services board," but left the modifier "with its consent" as it was. As a consequence it is now completely unclear who must consent to the referral for diagnostic study of a child held under the provisions of this section.

The phrase which begins the second sentence, "in default of bail," is unclear as to its meaning. The phrase is gramatically incorrect since it appears to be a conditional phrase but it lacks the "if" as a prefix. The phrase can be interpreted in one of three ways. It could mean, (1) that this section applies only when the child has violated his or her conditions of bail, (2) that this section applies only if the child cannot make bail, or (3) that the phrase works as a prohibition against granting bail in those cases where the Court feels a diagnostic study is necessary. The actual practice seems to be the latter.

The inclusion of a definition of the term "diagnostic study", would prove useful.

Ch. 119, Sec. 68B

This section provides for special foster homes and detention homes under the management of D.Y.S.

The section states that the Department of Youth Services may provide special foster homes and detention homes to be used for the temporary care, custody, and study of children committed to the care of the Department. These homes may be located at various places in the Commonwealth, but they must be completely separate from any police station, town lockup or jail, and they may be used only for temporary care and custody. The section states further that the Commissioner of Youth Services may transfer any child so committed from any foster home or detention home to another such home, at his discretion.

Comment: As mentioned previously, special foster homes and detention homes should probably be defined in sec. 52 of this chapter.

The use of the word "may" in the first line makes it appear as though setting up these foster and detention homes was discretionary on the part of the Department. The language should be changed to reflect its mandatory character.

The use of the word "committed" at the end of the first sentence to denote temporary custody is confusing, since "commitment" to D.Y.S. usually refers to commitment as the final disposition of a delinquency adjudication. This term is used similarly in sections 68 and 68A to refer to detention status.

Ch. 119, Sec. 68C

This section states that the Department of Youth Services shall provide and maintain diagnostic services for the purpose of providing diagnostic studies, reports and recommendations, as required by sec. 68A. The section states further that the Department may provide offices and facilities for these diagnostic services at such places in the Commonwealth as will best serve the needs of the several courts.

Comment: Conceptually, this material could be placed with the material on diagnostic services of sec. 68A.

Stylistically, the use of the word "provide" four times in this relatively short section is awkward.

Ch. 119, Sec. 69

This section provides essentially that the superintendent of a public school, a person in charge of a private school, or any of their teachers, shall furnish to a Court any information regarding the conduct, attendance, and standing of a pupil enrolled in that school if requested to do so by the Court, as long as the pupil in question is at the time awaiting examination or trial by the Court, or is under the supervision of the Court.

Comment: The repeated and indiscriminate use of the word "any" in this section is unnecessary. The section refers to the superintendent of "any" town, "any" teacher therein, "any" person in charge of a private school, being required to furnish to "any" Court "any" information requested by "any" justice thereof, etc. The substitution of the word "a" would be appropriate in most cases.

Again, clarification of the term "examination" is required. The term "supervision" requires clarification to insure that non-delinquency related supervision is excluded.

Ch. 119, Sec. 69A

This section provides that once a juvenile has been committed to the Department of Youth Services, a Court, probation officer, public and police authority, school authority, or other public official, shall make available to the Department all pertinent information in their possession in respect to the case.

Comment:
This section should be reviewed in relation to the rules and regulations of the holders of information referred to. Any needed language changes identified by such a review, should be instituted to conform with the intent of this section.

Ch. 119, Sec. 70

Provides that at any time during the pendency of a case against a juvenile, the Court may summon either parent or the guardian of the child, or the person with whom the child resides, in the manner provided for by Sec. 55. "Pendency" of the case includes awaiting adjudication, during continuance or probation, or after the case has been taken from the files.

Comment: The use of the phrase "a court or trial justice" is redundant. A trial justice functions no differently from the "court." The phrase "court," standing by itself, is adequate.

Ch. 119, Sec. 71

Provides that if a person to whom a summons is issued under sections 42, 55, or 70, fails to appear, the Court issuing the summons may issue a capias to compel the attendance of that person. The capias will be issued and served in the same manner as is a capias to compel the attendance of witnesses who have failed to appear on a subpoena issued on behalf of the Commonwealth in a criminal case.

Comment: Sec. 42 of this chapter has not existed since at least 1939.

Ch. 119, Sec. 72

Sections 72, 72A, and 74 (to a lesser extent) function in concert to govern the situation where a juvenile becomes seventeen or older either while his case is still unresolved in one form or another, or where he has not been apprehended until after becoming seventeen or older.

Section 72 governs the situation in which a juvenile's case is still unresolved or in which he has not been apprehended until between his seventeenth and eighteenth birthdays. Section 72 states that Courts shall continue to have jurisdiction in their juvenile sessions over children who have attained their seventeenth birthday pending one of the following things: (1) adjudication of their cases; (2) hearing and determination of their appeals; (3) continuances; (4) probation; or (5) after their cases have been placed on file. Section 72 states further that if a child commits an offense prior to his seventeenth birthday, but is not apprehended until between his seventeenth and eighteenth birthdays, the Court will deal with the child as if he had not reached his seventeenth birthday, and all provisions and rights with respect to a child under seventeen shall apply to such child.

In the second sentence of the section, the code provides that "nothing herein" shall authorize (1) the commitment of a child to the Department of Youth Services after he has attained his eighteenth birthday, or (2) give any Court in its juvenile session any power or authority over a child after he has attained his eighteenth birthday.

Comment: In enumerating the type of cases over which the Court may maintain jurisdiction after a child has turned seventeen, the code does not list transfer hearings, unless one interprets the term "adjudication" to include transfer hearings.

By stating at the beginning that "(c)ourts shall continue to have jurisdiction in their juvenile sessions over children who attain their seventeenth birthday pending adjudication, (etc.).," this section gives the misleading impression that it is applicable to all juveniles over seventeen. In fact, the last sentence of the section limits its applicability to juveniles between the ages of seventeen and eighteen. This sections exclusive application over juveniles between the ages of seventeen and eighteen should be stated at the outset of the section.

The prohibition in the last sentence of the section is worded in terms which are too absolute. In reality there are at least two statutory exceptions. They are, G.L. C. 120, sec. 17, and arguably, G.L. C. 119, sec. 63. The former section provides for the continued commitment of persons committed to the Department of Youth Services whose discharge proves dangerous, and requires the Department in seeking an extension to make its application to the "committing court," which in most cases must be a court in its juvenile session. The latter section provides juvenile courts with authority over adults in cases of inducing or abetting delinquency of a juvenile.

Ch. 119, Sec. 72 (con't)

The absolute prohibition on continuing the jurisdiction of the juvenile courts once a juvenile has reached eighteen creates, in conjunction with the rest of the statute, a potential loophole, as was demonstrated in the case of Commonwealth v. A Juvenile, 16 Mass. App. 251, 450 N.E.2d 1089 (1983). In that case defendant was arrested when he was sixteen, probable cause was found, and his case was continued for a transfer hearing. He thereupon defaulted and was not reapprehended until after his eighteenth birthday. He argued that the juvenile courts had lost jurisdiction when he had turned eighteen, and that he was immune from prosecution because section 74 of this chapter prohibits the criminal prosecution of a person who committed an offense prior to his seventeenth birthday, and against whom juvenile proceedings have not been dismissed as required by sections 61 and 72A. The Court closed this loophole by interpreting the term "apprehended" in sec. 72A to include rearrest upon default. This loophole still needs to be addressed by the code itself.

Ch. 119, Sec. 72A

Section 72A provides for proceedings upon apprehension after a juvenile's eighteenth birthday. The section states that the case of a person who commits a violation or an offense prior to his seventeenth birthday, and who is not apprehended until after his eighteenth birthday, should be heard and determined in accordance with sections 53 to 63 inclusive. In such a case the Court is required to hold a probable cause hearing, and either order the person discharged or order the juvenile complaint dismissed. The person will be discharged if the Court is satisfied that such discharge is consistent with the protection of the public; the complaint will be dismissed if the Court is of the opinion that the interest of the public requires that this person be tried in the criminal courts for his offense or violation. The probable cause hearing must be held prior to, and separate from, any trial on the merits.

Comment: In defining its jurisdiction to include only those persons who are apprehended after their eighteenth birthday, this section leaves a potential jurisdictional loophole. Section 72 defined its jurisdiction as including persons who are not apprehended until between their seventeenth and eighteenth birthdays. This language appears to exclude a person who is apprehended on his eighteenth birthday, and thus neither section 72, not section 72A, has proper jurisdiction over such a person. The better language would be to say, in section 72A, that its jurisdiction includes persons who are apprehended "on or after their eighteenth birthday."

Ch. 119, Sec. 74

Section 74 establishes limitations on criminal proceedings against children. It states that, except as provided later in this section, no criminal proceedings may be begun against any person who commited a violation or an offense prior to his seventeenth birthday unless delinquency proceedings against him have been begun and dismissed as required by sections 61 and 72A. The exceptions are (1) that a criminal complaint alleging a violation of chapters 89 (Law of the Road) and 90 (Motor Vehicles and Aircraft) which is not punishable by imprisonment or by a fine or more than $100, or (2) that a criminal complaint alleging any violation of a city ordiance or town by law regulating the operation of motor vehicles, may issue against a child between sixteen and seventeen years of age without first proceeding against him as a delinquent child.

Comment: This section is not in need of redrafting.

Ch. 119, Sec. 83

Section 83 provides that the indictment of any person bound over under sec. 75 shall be tried before the Superior Court in the same manner as any criminal proceeding. Upon conviction a person may be sentenced to whatever punishment as is provided for by law, or the person may be placed on probation, with or without a suspended sentence, for whatever period of time and under whatever conditions as the Court may order. However, if the person has not attained his eighteenth birthday prior to a finding or plea of guilty, the Superior Court may, in its discretion, and in lieu of a conviction, adjudicate the defendant delinquent and make such disposition as can be made by a district court or a juvenile court under section 58. But no person so adjudicated may be committed to the Department of Youth Services or continued on probation after he has attained his eighteenth birthday.

Comment: Section 75, to which this section refers, has been repealed. The intended reference is almost surely to section 61, the present section on transfer hearings.

Notice that this section states that the "indictment of any person bound over under section seventy-five shall be tried in the superior court...." Non-indictable offenses could thus arguably be tried in the district court in its criminal session, which is where non-indictable offenses in the cases of adults are tried. The language of this section does nothing to clarify the ambiguity, discussed in the comment to section 61, as to whether criminal proceedings against juveniles must always be held before the superior court, or whether they may also be held before the district court in its criminal session in the cases of non-indictable offenses.

Ch. 119, Sec. 84

This section provides that whenever a person is committed to the Department of Youth Services under sections 56, 58, or 83, a warrant of commitment shall issue. The warrant is addressed to the Sheriff or his Deputy, or to any constable or police officer of the County in which the case was heard. The section then goes on to set out the form of the warrant exactly as it should appear.

No variance from the form will be considered material if it sufficiently appears on the face of the warrant that the person is being committed by the Court in the exercise of its powers under this chapter. The warrant may be executed by any officer qualified to serve civil or criminal process in the County where the case is heard. Along with the warrant, the Court or magistrate issuing the warrant is required to transmit to the "designated officer" of the Department of Youth Services a statement of the substance of the complaint and the testimony give in the case, as well as other information about the person being committed "as can be ascertained." The officer serving the warrant is designated to transmit this information.

Comment: This section is not in need of redrafting, except for the word "guilty" in the first paragraph in the warrant. The appropriate replacement phrase would be "...alleged to be a delinquent child by reason..."

It is worth noting though that the language of the warrant itself is archaic, and could use some updating. By example, consider the following paragraph:

"You are therefore hereby required, in the name of the Commonwealth of Massachusetts, to take said defendant and him (or her) carry to the Department of Youth Services and him (or her) deliver to the (designated officer) thereof, together with an attested copy thereof, and thereafterward forthwith to return this warrant with your doings thereon into said court."

General Comments: The language of the code is frequently awkward and archaic, replete with continual references to "such court," "said child," etc. While this is in no way a substantive failing, cleaner and less archaic language would have the primary benefit of making the code more understandable to the general public.

The code has a tendency to lump a lot of material into a few sections, and sometimes bury significant material in the middle of one of its more obscure paragraphs. Particular offenders are sections 56, 58, 61, and 67. Section 67 fails to use any paragraphs at all. Again, this is more of a stylistic than a substantive failing, but if affects the accessibility of the code to both novice practitioners and the general public.

The definitional section (sec. 52) could be expanded to include such definitions as "detention home" and "special foster home," and to separate the definition of "delinquent child" into separate definitions of "juvenile" and "delinquent juvenile."

The codes uses such terms as "child" and "juvenile" interchangeably. As a stylistic matter, it might be preferable to use only one term, especially if that term has already been defined. This might obviate the need for repeated references in the body of the code to "a child between the ages of seven and seventeen."

The code has a tendency to cite somewhat carelessly to provisions of the criminal code without delimiting which parts of those sections are applicable. The result is that a literal reading of these various sections in combination often produces ambiguities and inconsistencies. While the probable intent of the drafters is often not difficult to discern, it might still be preferable to spell out which portions of a cited section of the criminal code are applicable, or in the alternative, to simply spell out applicable provisions of the criminal code in the juvenile code itself.

A provision as central to the juvenile code as the prohibition on detaining juveniles in a jail, house of correction, or police station or town lockup that is not D.Y.S. approved, is probably deserving of its own section.

The code almost constantly references other sections of the same chapter without specifying that they are from the same chapter. While it is not difficult to discern in these instances what the drafters probably intended, any reference to another section within the code should be absolutely precise and complete, leaving no margin for error.

The drafting of the code in almost exclusively masculine terms may be unnecessary. While gender-neutral language is sometimes awkward, a modern code could do well to reflect an appreciation for the equality of the sexes in its choice of language.

In conclusion, there are areas of regulation omitted that are essential to the proper functioning of a juvenile code. Some of these areas are prescribed by case law, by Massachusetts Rules of Criminal Procedure or by court rule, nonetheless, their importance mandates inclusion in the statutory framework. These areas include: arraignment; standards relative to representation by counsel; bail standards; privelege against self incrimination; confrontation and cross examination of witnesses; and, dispositional guidelines.

PROVISIONS OF CHAPTER 120 OF THE JUVENILE CODE, WITH COMMENTARY

Chapter 120, Sec. 1

Section 1 provides that the Department of Youth Services shall be a corporation for the purpose of taking, holding and investing (in trust for the Commonwealth) any grant, devise, gift, or bequest made for the use of any institution of which the Department has the management, government, and care. This provision is subject to G.L. c. 10, s. 15. The Department shall succeed to and retain the rights, powers and duties formerly held by the Division of Youth Services and Youth Service Board, except as otherwise provided by G.L. c. 10, s. 15 and by provisions of this chapter.

Comment: This section is not relevant to the delinquency code per se.

Ch. 120, Sec. 2

The first sentence of section 2 states that the Department of Youth Services shall have the management, government and care of the Lyman School for Boys, the Industrial School for Girls, the Industrial School for Boys, and "all other institutions" (except correctional institutions) supported by the Commonwealth for custody, diagnosis, care, and training of delinquent or wayward children, habitual truants, habitual absentees, habitual school offenders, or juvenile offenders.

The second sentence states that the Department shall have control of the land and buildings of said schools.

The third sentence states in essence that to carry out the duties assigned to the Department under this chapter, the Commissioner is empowered to authorize the employment of certain professionals and expert personnel, within the limits of the amount appropriated therefore.

The fourth sentence states that physicians, dentists, and psychiatrists employed under the authority of this section shall not be subject to the provisions of G.L. c. 31 (Civil Service) or G.L. c. 30, s. 9A (Veterans holding unclassified positions).

Comment: This section is in need of substantial redrafting. The first sentence in particular contains references to a number of institutions and categories of offenses which no longer exist. Thus, the references to the Lyman School, the Industrial School for Girls, and the Industrial School for Boys should be deleted. Also, the references to wayward children, habitual truants, habitual absentees and habitual school offenders should be deleted, since none of these constitute an offense under the present delinquency code. In general, the whole first sentence needs to be redrafted to reflect the fact that the Department now places most of the juveniles committed to its custody with private service providers on a contractual basis.

The second sentence should be deleted depending on whether or not the Department still maintains control of the land and buildings of those schools.

The third and fourth sentence of the section could be made into a separate paragraph, since they contain material which is conceptually distinct from the material contained in the first two sentences.

In the third sentence, the phrase "to carry out its duties under this chapter, the Commissioner shall authorize, etc.," is grammatically incorrect. The phrase should read, "to carry out the duties of the Department under this chapter, the Commissioner shall authorize, etc."

Ch. 120, Sec. 3

Section 3 states that the Commissioner of Youth Services is authorized to appoint a superintendent, a chaplain, a physician, and all other officers and employees required at those schools and institutions under the Department's management, and that he is authorized to prescribe their duties.

Comment: This section should probably be deleted in its entirety, in view of the fact that the schools and institutions being referred to no longer exist. Provisions regarding the power, authority, and duties of the Commissioner would be better reserved for Chapter 18A of the General Laws, which establishes the Department of Youth Services.

Ch. 120, Sec. 4

Section 4 provides that the Commissioner shall establish rules, regulations, and by-laws for the government of each institution, and that he will see to it that the affairs of these institutions are conducted according to these rules, regulations, and by-laws, as well as according to law. The purpose of these rules, and of all educational, employment, training, disciplinary, recreational, and other activities carried on in the institutions shall be to restore the self-respect and self-reliance of the children lodged in the institutions, and to qualify them for good citizenship and honorable employment.

Comment: This section needs to be substantially redrafted, since the institutions it refers to no longer exist. The second half of the section referring to the purpose of educational, employment, training, disciplinary and educational activities could be redrafted to provide that these purposes should be reflected in the activities of the private service providers with whom the Department now contracts. The first half of this section on the establishment of rules, regulations, and by-laws should be deleted, or, if appropriate, should be amended to provide for the adoption of whatever rules and regulations are necessary for the governance of those facilities which are actually operated and managed by the Department.

Ch. 120, Sec. 5

Paragraph (a) of section 5 provides that when a person has been committed to the Department, it shall, under rules established by it, examine and study the person and investigate all pertinent circumstances of his life and behavior.

Paragraph (b) states that the Department shall make periodic reexamination of all persons within its control. These examinations may be made as frequently as the Department considers desireable, but they must be made at least once every year.

Paragraph (c) states that the Department shall keep written records of all examinations and of the conclusions based thereon, as well as of all orders concerning the disposition or treatment of every person subject to its control.

Paragraph (d) states that the failure of the Department to examine a person committed to it, or to reexamine him within one year of a previous examination, does not of itself entitle that person to discharge, but does entitle him to petition the committing court for an order of discharge. The Court shall discharge a petitioning person unless the Department satisfies the Court of the necessity for further control.

Comment: This is a well drafted section, and not in need of revision.

Ch. 120, Sec. 6

Section 6 sets out the Department's options after the commitment of a juvenile to its care. The Department may, after an objective consideration of all available information, do any of the following things:

(a) permit him his liberty under supervision and upon such conditions as it believes conducive to law-abiding conduct;

(b) order his confinement under such conditions as it believes best designed for the protection of the public;

(c) order reconfinement or renewed release as often as conditions indicate to be desirable;

(d) revoke or modify any order, except an order of final discharge, as often as conditions indicate to be desirable; or,

(e) discharge him from the Department's control when it is satisfied that such discharge is consistent with the protection of the public. The Department must notify "the court" of the discharge, and the discharge may not be in conflict with section 12 of this chapter.

Comment: The reference to "the court" in section 6(e) should be amended to read "the committing court." Otherwise it is not precisely clear which court should be notified.

Section 12 of this chapter does not provide any substantive limitations on the Department's power of discharge. It is unclear how section 12 should modify section 6(e).

Section 6(e) should specify that once a person is discharged from the Department's control, the Department has no way of bringing that person back under its control. This would only occur when a Court recommits the person to the Department after an adjudication for a subsequent offense.

Ch. 120, Sec. 6A

Section 6A provides that, for the purpose of correcting the "socially harmful tendencies" of a person committed to it, the Department may do any of the following things:

(a) require participation by that person in vocational, physical, educational, and correctional training and activities;

(b) require such modes of life and conduct as seem best adapted to fit that person for return to full liberty without danger to the public; and,

(c) provides such medical or psychiatric treatment as is necessary.

Comment: Unlike section 6, in which the options are disjunctive, the options in this section appear to be conjunctive. Their conjunctivity could be emphasized by ending the statement of each option with a semi colon and an "and," instead of with a period. Thus section 6A would read:

(a) Require participation by him in vocational, physical, educational, and correctional training and activities; and---

This would make section 6A stylistically identical to section 6.

The phrase in section 6A(b), "modes of life and conduct," is ambiguous as to its meaning.

Ch. 120, Sec. 7

Section 7 sets forth the powers and duties of superintendents of schools and other institutions. It provides in the first sentence that the superintendent of each school or other institution, along with the subordinate officers, shall have the general charge of and be responsible for the welfare and custody of the children lodged therein. The superintendent and the subordinate officers are also responsible for carrying out the rehabilitative program prescribed by the Commissioner of Youth Services.

The second sentence provides that the superintendent shall be a constant resident at the school, and that he will seek to establish relationships and to organize ways of life that will meet the moral, physical, emotional, intellectual and social needs of the children under his care, as those needs would be met in "adequate homes."

Comment: This section needs to be deleted or revised in accordance with current practice. The position of superintendent has been abolished in the aftermath of deinstitutionalization, but the Department does employ "facility administrators," who administer the Department's facilities and forrestry camps. A statutory description of the powers and duties of facility administrators might however be better reserved for chapter 18A, creating the Department of Youth Services.

Ch. 120, Sec. 8

Section 8 provides that superintendents must be bonded to the Commonwealth, and sets forth rules relative to the superintendent's administration of the property and finances of the schools.

Comment: This section should in all likelihood be repealed, since the position of superintendent no longer exists.

Ch. 120, Sec. 9

Section 9 provides for the purchase of books for the Industrial School for Girls from the income and profits of the Henry B. Rogers fund.

Comment: This section should in all likelihood be repealed. The Industrial School for Girls has been closed since 1972. The Rogers fund, like the Lyman fund as well as a number of other funds that were established for the benefit of the former training schools, has not been used since the closing of the training schools in 1972.

Ch. 120, Sec. 10

The first paragraph of section 10, paragraph (a), provides in essence that the Commissioner of Youth Services is authorized to make use of public and private institutions, facilities, or agencies, for the purpose of carrying out the Department's duties. These institutions, facilities, or agencies should be within the Commonwealth whenever feasible, but may also be outside of the Commonwealth. The Department may not transfer any person committed to its custody and who is under eighteen to a penal institution. The Commissioner may enter into agreements with public or private officials for the separate care and special treatment in existing institutions of persons committed to the Department.

The second paragraph of paragraph (a) provides that the Commissioner of Youth Services (with the assistance of the Executive Secretary to the Advisory Committee), is responsible for convening and programming a meeting of the Youth Services Coordinating Council. The Council must be convened at least twice annually. The Council is composed of the Commissioners of Public Health, Mental Health, Education, Public Welfare, Corrections, Probation, and Administration and Finance. It meets for the purpose of providing for the coordination and mutual assistance in the carrying out and evaluation of all programs relating to youth services in the Commonwealth, and it jointly prescribes and amends rules and recommendations of the various departments represented for those purposes.

Paragraph (b) provides that nothing in this section may be construed as giving the Department of Youth Services any control over existing facilities, institutions, or agencies other than those listed in section 2. The Department may not require such facilities, institutions or agencies to do anything inconsistent with their functions, or the laws and regulations governing their activities. The Department has no power to make use of any private institution without that institutions's consent, or to pay a private agency for services which a public institution or agency is willing and able to perform.

Paragraph (c) provides that public institutions and agencies are required to accept and care for delinquent children and convicted persons sent to them by the Department just as they would be required to do if the person had been sent to them by a court.

Paragraph (d) provides that the Department is (1) given the right, and (2) shall be required periodically to inspect all public and private institutions and agencies whose facilities the Department is utilizing. Each of these public or private institutions or agencies is required to afford the Department reasonable opportunity to examine or consult with any person who has been committed to the Department but who for the time being is in the custody of one of these institutions or agencies.

Paragraph (e) states that neither the placement in or release from one of these public or private institutions or agencies terminates the control of the Department over a person committed to its custody. No person placed in a public or private institution or agency may be released from it without the approval of the Department.

Ch. 120, Sec. 10 (con't)

Comment: In the first paragraph (a) a comma needs to be placed after the phrase "and discharge of persons committed to the department."

There is no obvious reason that paragraph (a) should consist of two paragraphs while all the other paragraphs consist of only one. A better system would be to number the six paragraphs from (a) through (f).

The reference to the "advisory committee" in the first sentence of the second paragraph of part (a) should specify that this is the Advisory Committee to the Department of Youth Services.

Also in the first sentence of the second paragraph, the statute, when listing the Commissioners of whom the Youth Services Coordinating Council shall be composed, fails to mention the Commissioner of the Department of Youth Services. Since the Commissioner of Youth Services convenes the Council it is evident that the drafters intended to include him as part of the membership. Nevertheless, it might be better to list him as a member.

The third sentence of the second paragraph states that the council shall jointly prescribe and recommend rules of their various departments. While the Council can certainly recommend rule changes it is not equally clear that they can jointly "prescribe or amend" rules of their various departments, since some of those departments, such as Mental Health and Public Welfare, are subject to the rulemaking provisions of the State Administrative Procedure Act.

In paragraph (b), for accuracy's sake, the word "herein" should be deleted and replaced by the phrase "in this section."

Since the institutions listed in section 2 of this chapter over which the Department "has control" are no longer in existence, the first sentence of paragraph (b) needs to be modified to reflect those facilities over which the Department presently has control. These facilities include the secure detention facilities at Westfield, Westborough and Roslindale, and the forestry camp in Brewster.

Ch. 120, Sec. 11

Section 11 provides for the establishment of certain facilities under the auspices of the Department. The section states that when funds are available, the Commissioner may establish and operate the following kinds of facilities:

(a) places of detention and diagnosis for all persons committed to the Department;

(b) additional training and treatment facilities necessary to classify, segregate, and handle juvenile offenders of different ages, habits, and mental and physical condition; and,

(c) facilities to aid juveniles given conditional release or discharge with finding employment and leading a law abiding existence.

The section also states that the Commissioner shall establish forest and farm school camps to which children committed to the Department may be sent. These camps must be established either on land under the control of the Department of Environmental Management, or upon any other site approved of by the Commissioner of Environmental Management. The purpose of these camps is to provide such education and training as may be deemed best for the children sent there. The work projects may be assigned in farming, reforestration, or the maintenance and development of state forests and recreational areas, as approved by the Commissioner of Environmental Management.

Comment: The problem with this section is that it consists solely of one run on sentence. The suggested solution would be to insert a period after "law abiding existence" in (c), then begin a new sentence with "The Commissioner shall..."

Ch. 120, Sec. 12

Section 12 states that the Department may direct "release under supervision" at any time. When doing so, the Department may place the child in his "usual home," or in any "situation or family" that has been approved by the Department.

The Commissioner of Youth Services may, subject to appropriations, employ agents for investigating places and for visiting and supervising children. The Commissioner may also, subject to appropriations, provide for the maintenance (in whole or in part) of any child placed in the charge of any person. Immediately upon the placement of a child in families or homes, the Commissioner of Youth Services is required to notify the Commissioner of Public Welfare of the name of each child placed, and the name and residence of the family or home in which the child has been placed.

The Department may at any time, until the expiration of the period of commitment, resume the care and custody of any child released under supervision.

When practicable, the Department shall place a child in a family or home having the same religious beliefs as the child. If this is impracticable then "due regard shall be had to the locality," and the home shall be such that the child shall have the opportunity to attend religious worship of his own belief (if practicable.)

Comment: In the third sentence, the statute provides that the Commissioner of Public Welfare must be notified when a child is placed in a home or with a family. This statute was last amended in 1969 before the creation of the Department of Social Services. At this point the Department of Social Services is probably the more appropriate agency to receive notification of the placement of delinquent children, if such notification is deemed to serve any useful purpose.

Ch. 120, Sec. 13

Section 13 provides that in any case where a juvenile committed to the Department, has either escaped from a facility or institution in which he has been placed, or has been released on parole and violated the conditions thereof, that juvenile may be arrested without a warrant by any of the following people: a sheriff, a deputy sheriff, a constable, a police officer, or a person employed and authorized by the Department of Youth Services. Once arrested the juvenile may be kept in custody in a "suitable place," until he may be returned to the custody of the Department.

Comment: The current arrest provisions, for a suspected parole violation, are potentially subject to constitutional attack. The lack of clarity and procedure could render this section either void for vagueness of violative of due process protection. Minimally, a clearer definition of "broken the conditions thereof" is needed. This clarification should address the issues of by what standards these "conditions" are determined to have been broken, and by whom this determination is to be made.

The phrase "suitable place" is in need of further definition. G.L. c. 119, s. 67 provides that juveniles arrested without a warrant may be held at police stations and in town lockups which have been approved by the Department.

Ch. 120, Sec. 13A

Section 13A provides for the compensation of any person whose property was damaged by an "inmate" in the process of escaping from the Lyman School, the Industrial School for Boys, the Industrial School for Girls, the Westborough reception center, or any other institution of which the Department has management, government, and care, as provided for by section 2 of this chapter. The Department must make a written request for such a disbursement and any funds approved must be paid out of the State Treasury from such funds as may be available for that purpose. Any sum paid out will be in the amount as the Attorney General shall determine to be just and reasonable, and as the Governor and Council shall approve. Provided that written notice of the damage and the claim for compensation be filed with the Department of Youth Services within one year from the date on which the damage occurred.

Comment: The references to the Lyman School, both Industrial Schools, and the Westborough Reception Center need to be deleted, since these institutions no longer exist. The phrase "any other institution of which the department has management, government, and care under the provisions of section 2" arguably covers the secure detention facilities and any other facilities that the Department now operates. Section 2 needs to be amended in any case to reflect current practices.

In the first line of the section, it is not clear to whom the Department must make written application for the disbursement of compensation funds.

The use of the word "inmate" in line #4 of the section is an inappropriate choice of words. The juvenile code repeatedly emphasizes that delinquent and committed children are not criminals, and the language of the statute here should reflect that characterization.

The reference to "council" in the third to last line of the section is ambiguous. The Council being referred to should be specified.

Ch. 120, Sec. 14

Section 14 provides that whenever the Department finds that any person committed to it is insane or feeble minded (as defined by G.L. c.123), a sexual psychopath (as defined by G.L. c.123A), or a potential psychopath (as defined and determined by the Assistant Commissioner of the Bureau of Clinical Services), the Department may apply to the proper court for a new commitment to the appropriate agency in accordance with law.

Comment: Ch. 123 was completely revised in 1970, and Ch. 123A was completely revised in 1958. Ch. 123 no longer appears to use the terms "insane" or "feeble minded," and Ch. 123A has rescinded its definition of "sexual psychopath" and replaced it with a definition of "sexually dangerous persons." The language of this section should be revised to reflect the new terms and practices of Chapters 123 and 123A, including deletion of reference to the "Assistant Commissioner of the Bureau of Clinical Services."

Ch. 120, Sec. 15

Section 15 provides that, with the Department's consent, the Commissioner of Correction may transfer any boy under seventeen who has been sentenced to the Massachusetts Reformatory, or any girl under seventeen who has been sentenced to the Reformatory for Women to the care of the Department for such disposition as in the opinion of the Department, will best serve the needs of that boy or girl, and best protect the interests of the public.

Comment: The names of the Massachusetts Reformatory and the Reformatory for Women have been changed to M.C.I. Concord and M.C.I. Framingham respectively. The language of the statute should reflect that change.

In 1948, at the time of the statute's enactment, the Reformatories in Concord and Framingham were the only state institutions to which a person receiving a state prison sentence could be sentenced. Men may now also be sentenced to M.C.I. Walpole. The statute should therefore be amended to include Walpole as one of the institutions to which a juvenile may be sentenced, and from which sentence he may be transferred back to the Department of Youth Services by the Department of Correction.

Ch. 120, Sec. 16

Section 16 provides that every person committed to the Department as a wayward or delinquent child (if not already discharged) shall be discharged when he reaches hie eighteenth birthday, and that every person committed to the Department after conviction in criminal proceedings shall be discharged (if not already discharged) when he reaches his twenty-first birthday. Discharge can be forestalled in either case if the Department files a petition as provided by section 17 of this chapter.

The Department may continue to have the "responsibility" for "any person provided for in this chapter" who is under twenty-one years of age for the purpose of participation in specific educational or rehabilitative programs, under conditions agreed upon by both the person and the Department, and terminable by either.

Comment: The reference to "wayward child" in the first line of the section needs to be deleted, since waywardness is no longer included in the definitions of the juvenile code.

In the third sentence, the statute is unclear as to the meaning of the terms "responsibility" and "any person provided for in this chapter." If participation in specific educational or rehabilitative programs is voluntary, then the nature of the Department's "responsibility" for such a person is unclear. And the phrase "any person provided for in this chapter" is simply imprecise as to its meaning. Presumably it refers to any person who has been either committed or referred to the Department.

This section provides that a person committed to the Department as a wayward or delinquent child must be discharged upon reaching age eighteen, and a person committed to the Department subsequent to a criminal conviction must be discharged upon reaching age twenty-one, unless the Department files a petition for continued commitment. However, a close reading of Ch. 119, s. 83 would suggest that a person can only be committed to the Department subsequent to an adjudication of delinquency, and never subsequent to a criminal conviction. Ch. 119, s. 83 appears to provide, in pertinent part, that a juvenile bound over and convicted before the superior court may be sentenced to the same punishment as could an adult upon conviction for the same offense, or a juvenile of under eighteen may be adjudicated delinquent in lieu of a conviction. If adjudicated delinquent, the superior court can make the same disposition of a juvenile as can a district court or juvenile court under Ch. 119, s. 58. One of the dispositional alternatives under section 58 is commitment to the Department.

Ch. 120, Sec. 17

Section 17 states that whenever the Department is of the opinion that discharge of a person from its control (at the age limit stated in section 16) would be "physically dangerous to the public because of a mental or physical deficiency, disorder, or abnormality," the Department shall order that the person remain subject to its control beyond the period stated in section 16, and the Department shall make application to the committing Court for a review of that order. The Department's order and application must be made at least ninety days before the time of discharge provided for by section 16. The application must be accompanied by a written statement of the facts upon which the Department concludes that discharge of such a person would be physically dangerous to the public. No application or order by the Department will be dismissed or discharged merely because of its form or an asserted insufficiency of its allegations. Every order shall be reviewed upon its merits.

Comment: The use of the term "physically dangerous to the public" in the first sentence of the section is ambiguous. The section should clarify whether this applies only to persons who are likely to assault and injure individual members of the public, or whether this applies also to persons who are likely to do property damage that may involve danger to the public, such as arson.

The first sentence of this section ostensibly sets up two conditions prerequisite for the Department to refuse to discharge a person within its control. These are (1) that the person be physically dangerous to the public, and (2) that this be because of some mental or physical deficiency, disorder, or abnormality. It is not clear that the drafters intended to establish a two-step test for discharge. Most likely the language about mental or physical deficiency, disorder or abnormality is included because the drafters could not envision a person being dangerous to the public and not having some such disorder. For clarity's sake the sentence should be amended in one of two ways: (1) it should eliminate the reference to mental or physical deficiency, disorder or abnormality, because that reference is superfluous; or (2) it should specify that the presence of a mental or physical deficiency, disorder or abnormality is the second half of a two-step test.

When the statute states "merely because of its form" what is intended is presumably an inadequacy or irregularity in the form of the order and application.

Ch. 120, Sec. 18

The first paragraph of section 18 provides that if the Department applies to the Court for review of a section 17 order, the Court must notify either the "person whose liberty is involved," or if he or she is not "sui juris" (having capacity to manage their affairs), the parents or guardian must be notified. If a parent or guardian cannot be reached the Court must appoint a person to act in the place of the parent or guardian. The Court must afford the person subject to the extension order an opportunity to appear in Court with the aid of counsel. He must also be given the power of process to compel the attendance of witnesses and the production of evidence. If the person subject to the extension order is unable to provide his own counsel, the Court must provide counsel for him.

The second paragraph of the section provides that if after a "full hearing" the Court determines that discharge of the person would be physically dangerous to the public, the Court shall confirm the order of the Department. Otherwise the Court shall disapprove the order and shall order the person discharged from the Department's control.

Comment: The phrase "person whose liberty is involved" could be replaced by a more precise phrase, such as "person subject to the extension order."

The parenthetical section of the first paragraph is situated awkwardly within the sentence. The paragraph would be easier to read if the parenthetical section were removed and made into a separate sentence.

In the parenthetical section itself a comma should be placed after the phrase "if such person can be reached."

As presently interpreted, the standard of proof in a confirmation hearing must be "proof beyond a reasonable doubt." Department of Youth Services v. A Juvenile, 384 Mass. 784, 429 N.E.2d 709 (1981). The reason for this is that, according to the Supreme Judicial Court, a confirmation hearing functions not merely as an extension of prior juvenile proceedings, but functions instead as an independent determination akin to a criminal proceeding. Id., 429 N.E.2d at 713. This conclusion is bolstered by language in section 20 which states, in essence, that appeals of confirmation hearings go to a district court jury session in the manner provided for appeals to such sessions in criminal cases. Therefore, this section should be amended to include a specific statement of the standard of proof governing confirmation hearings.

Ch. 120, Sec. 19

The first paragraph of section 19 provides in essence as follows: if an order of the Department is confirmed by a reviewing Court the control of the Department over the person continues. The Department retains the discretion to discharge such a person before the period of extended commitment has expired. Such discharge must be in conformity with the provisions of section 6(e) of this chapter. If the Department chooses not to discharge a person before the expiration of their extension of commitment then the Department "shall" make a new order and application. In the case of wayward and delinquent children, such new order and application must be made within two years of the confirmation of the previous order, and in the case of persons committed to the Department after conviction in criminal proceedings the new order and application must be made within five years. These orders and applications may be repeated as often as the Department believes is necessary for the protection of the public. The Department shall have the power to transfer custody of any person eighteen years of age or older to the Department of Correction.

The second paragraph provides in essence that every person shall be discharged at the end of an extension period unless the Department has acted to reextend the period of commitment, and that if the Court fails to confirm an order of extension the person will be discharged in any case.

Comment: The first sentence of the first paragraph states that unless a person has been discharged in accordance with the provisions of section 6(e) within a certain time period, the Department shall make a new order and application for the extension of the commitment period. More appropriate language would state that the Department may make a new order and application at the end of the period of extended commitment. The second paragraph of this section makes clear that a person will be discharged at the end of their extension period unless the Department makes a new order and application. As the first sentence of the first paragraph now reads the Department is required to choose between discharging a person prematurely or having to make a new order and application.

Section 19 never states explicitly that the duration of the period of extended commitment is two years for wayward and delinquent children and five years for persons committed of crimes. The duration is only suggested by the language concerning when the Department shall make a new order and application. Nor is the duration of the period of extended commitment specified in any of the previous sections of this chapter. This section should therefore be amended to state the duration of the extension period explicitly, and to provide that the Department may make a new order and application at the expiration of the extension order.

The reference to "wayward children" in the first sentence of the first paragraph is inappropriate, since wayward children are no longer included under the definition of the delinquency code.

In the second sentence of the first paragraph, the use of the word "except" is inappropriate. The Department's power to transfer adults to the Department of Correction does not operate as an exception to its power to renew orders and applications for extension of commitment. It operates as a separate power, and should be included as a separate sentence.

Ch. 120, Sec. 19 (con't)

The language of the second paragraph is awkward. The phrase "period stated in this section" should be replaced by the phrase "period of extension of commitment," and the phrase "previously acted as therein required" should be replaced by the phrase "issued new orders and applications for the extension of commitment."

As presently structured, this section provides no limit on the number of extensions which the Department can order. The potential results should be reviewed for possible due process violation.

As had been noted in the comment to section 16, Ch. 119, s. 83 seems to preclude the commitment of a juvenile to the Department subsequent to a criminal conviction in the superior court. The material of this section relative to extensions of commitment for persons convicted of crimes is arguably inappropriate, since under this interpretation no persons convicted of crimes could ever be committed to the custody of the Department in the first place.

Ch. 120, Sec. 20

Paragraph (a) provides that if the Court confirms an order, the "person whose liberty is involved" may appeal to the District Court Jury session for a reversal or modification of the confirmation. The appeal is taken in the manner provided for appeals to a jury session from a bench trial in criminal cases.

Paragraph (b) provides that the jury session may affirm the order, modify it, or reverse it and order the appellant discharged.

Paragraph (c) provides that pending the appeal the appellant shall remain under the control of the "Board."

Comment: The references in paragraphs (b) and (c) to the "board" are apparently references to the old Youth Services Board, which has since been transformed into the Department of Youth Services. The language should accordingly by amended to read "department."

This statute provides that appeals may be to the district court jury sessions for criminal cases. The legislature apparently intended to apply the same two-tier trial system to court confirmation of orders of extension of commitment by the Department of Youth Services that is already being used for criminal trials and delinquency adjudications in the Massachusetts district courts. The problem is that the court which initially reviews an order of extension of commitment by the Department is the "committing court" (see section 17 of this chapter), which in all cases would be either a juvenile court or a district court in its juvenile session.

This section, however provides for the appeal to be taken to the district court jury session "in the manner provided by law for appeal...in criminal cases." This language suggests that appeals go to the district court in its criminal session from an initial hearing in the juvenile session. It is doubtful that the legislature intended such an anomaly, and the language of the section needs to be amended to clarify to which sessions of the district court these cases are appealed. This should include the appellate divisions of the juvenile courts.

Ch. 120, Sec. 21

The first paragraph of the section provides that commitment to the Department of a wayward or delinquent child shall not disqualify the child from any "further" examination, appointment, or application for public service in the government of the Commonwealth or any political subdivision thereof.

The second paragraph provides that whenever a person convicted of a crime is discharged from the Department the discharge has the effect of (1) restoring the person to his civil rights, and (2) setting aside his conviction. The conviction shall not disqualify the person from any future examination, appointment, or application for public service in the government of or any political subdivision of the Commonwealth.

The third paragraph provides that records of commitment to the Department will be withheld from public inspection except with the consent of the Department. However, records concerning any child who was between seven and seventeen years of age when committed to the Department shall be open, at all reasonable times, to the child, his or her parents, guardian, or attorney. A commitment to the Department will not be received in evidence or used in any way in any court except in subsequent proceedings for waywardness or delinquency against the same child, and except in imposing sentence in any criminal proceeding against the same person.

Comment: The references to "wayward child" in the first paragraph, and "waywardness" in the third paragraph, should be deleted.

The clause "when so ordered by the department," appearing in the second paragraph, should be deleted. As it now reads, the language of the statute is unclear as to whether the Department orders the discharge, or the restoration of civil liberties and the setting aside of the conviction.

The phrase "further examination, appointment, or application," in the first paragraph should almost certainly be "future examination, appointment, or application," and should be amended accordingly.

This section covers substantially the same material as section 60 of chapter 119. The primary difference is that this section focuses on the record of commitment, whereas section 60 focuses on court records. In the interest of economy one could include in section 60 a specific mention of the commitment records, and amend this section to simply reference section 60. On the other hand, the inclusion of this section at this juncture is not at all inappropriate, and spares the reader having to reference section 60.

Ch. 120, Sec. 22

Section 22 provides that the Department is required to conduct continuing inquiry into the effectiveness of the rehabilitative treatment methods which it employs. To this end the Department is required to obtain all court record information on juveniles subsequent to their discharge from the Commissioner of Probation. This information must be tabulated and analyzed so that it may be used to evaluate the relative merits of various treatment methods. The results of these studies must be made available to the public in an annual report which the Department makes to the Governor and to the General Court.

The section goes on to provide specifics on what must be included in the general report. The section states also that the report shall include such recommendations for legislation as the Department may wish to make.

Comment: The reference to "words" in the second sentence of the section should almost certainly be "wards." The sentence should be amended accordingly.

Ch. 120, Sec. 23

Section 23 provides that the Department may act as the guardian for any boy or girl in its charge who is under the age of eighteen, and who has neither a living parent nor a guardian. If the Department does act as guardian it shall have all the power and authority conferred by chapter 201 (Guardians and conservators). If a guardian is subsequently appointed for the child, the powers conferred by this section shall cease.

Comment: The possible scenario where the Department is acting as guardian in a subsequent delinquency or extension hearing should be prohibited by the language in this section.

Ch. 120, Sec. 23A

Section 23A provides that the Department must pay annually to the state treasurer any unclaimed money held for the benefit of former wards whose whereabouts have been unknown for seven years subsequent to his or her coming of age, and specifies some of the mechanics of such payments.

Comment: This section is not relevant to the delinquency code as such.

Ch. 120, Sec. 24

Section 24 provides that the Department may expend any money given as a gift for the following two purposes: erecting houses or other buildings on the Commonwealth's land at Lancaster, and increasing the accomodation and facilities of the Industrial School. In either case the plans therefor need to be approved by the Bureau of Building Construction before they can be implemented.

Comment: This section needs to be revised or repealed to reflect current practices. The Department no longer operates either of the industrial schools.

Ch. 120, Sec. 25

Section 25 provides that the provisions of this chapter relative to commitment to the Department shall extend to boys and girls committed by authority of the courts or magistrates of the United States.

Comment: This section is not in need of redrafting.

Ch. 120, Sec. 26

Section 26 provides that whoever aids or assists a child committed to the Department in escaping or attempting to escape from the Department's custody shall be punished by a fine of not more than $100 or by imprisonment of not more than one year.

Comment: The phrase, "if convicted" should be inserted between the words "shall," and "be punished."

GENERAL COMMENTS

The reference to "Massachusetts Training Schools" should be deleted from the title of the section.

Chapter 120 could use a definitional section. Terms that could use definition include "Department," "discharge," "extension order," "Commissioner," and "committing court," etc.

The chapter could be more consistent in its use of alphabetic characters. The chapter uses alphabetic characters both to enumerate paragraphs, (sections 5 and 10) and to enumerate options (sections 6, 6A and 11).

The statute frequently makes reference to other sections without specifying that they are sections of this chapter.

The statute uses the terms "juvenile," "child," "person," and "boy or girl" interchangeably. A more consistent use of one term, such as "juvenile" might be stylistically desirable.

Some of the sections of this chapter are drafted in awkward language (see e.g. sections 13A, 18, and 19). While not in need of substantive change, these sections could be redrafted to improve their readability as part of a comprehensive code revision.

There is some question of whether there is a need for this chapter at all, since Chapter 119 already covers material relative to delinquency proceedings and criminal proceedings against juveniles, and Chapter 18A covers material relative to the Department of Youth Services. Chapter 120 was originally established in the 1921 recodification and revision of the General Laws, at which time it covered material relative to the training schools. In 1948 the training schools were all put under the management of the Youth Service Board, and Chapter 120 was amended to incorporate material relative to the Youth Service Board. With the establishment of the Deparment of Youth Services in 1969 as sucessor to the Youth Service Board, material relative to the governance of the Department was incorporated into a new chapter of the General Laws, Chapter 18A. Subsequently the training schools were closed. With each of these changes, the necessity for a separate Chapter 120 has diminished. At this point, it would seem to make more sense to transfer some of the materials now contained in Chapter 120 into Chapter 119 and other material into Chapter 18A, depending on content. Or, in the alternative, the provisions on delinquency proceedings and criminal proceedings against children contained in the latter half of Chapter 119 could be severed from the provisions on the protection of children and on children in need of services contained in the first half of Chapter 119, and from the basis of a new Chapter 120.

PROVISIONS OF CHAPTER 18A, WITH COMMENTARY

Chapter 18A, sec. 1

The first paragraph of section 1 provides that there shall be a Department of Youth Services which will be under the supervision of the Commissioner of Youth Services. The Commissioner will be appointed by the Governor with the advice and consent of "the Council" for a term coterminous with that of the Governor. The Commissioner will be qualified (1) by having earned a graduate degree from an accredited institution in the social sciences, education, law, or related fields, and (2) by having at least seven years professional or administrative experience in work related to the problems of delinquent youth. The position of Commissioner will be classified in accordance with G.L. c. 30, s. 45, (Office and position classification plan), and his salary will be determined in accordance with G.L. c. 30, s. 46 (Administration of classification and pay plans). The Commissioner is required to devote his full time during business hours to the duties of his office. He is the executive head of the Department, and has full responsibility for the formulation and execution of its policies and the coordination of all its functions. He appoints and removes all employees of the Department, but unless otherwise provided by law, all such appointments and removals must be in accordance with the provisions of Chapter 31 of the General Laws.

The second paragraph of section 1 provides for the following things:

- that powers and duties given to any administrative bureau, subdivision, or institution of the Department by any general or special law shall be execised subject to the control of the Commissioner;
- that the Department may spend money appropriated to it (a) for grants to cities and towns and other public agencies, and (b) for the purchase of services from other government departments and from private nonprofit agencies for the purpose of carrying out the program of the Department;
- that the Commissioner may establish, subject to appropriation, district offices and employ field agents necessary to carry out the program of the Department;
- that any federal funds granted to the Commonwealth to help finance the program and purposes of the Department must be credited to a separate fund, expenditures from which can be made only at the direction of the Commissioner; and,
- that federal funds paid as reimbursement to the Commonwealth must be deposited in the General Fund.

Comment: This section would be better if the material that comprises the section were broken up into a number of sections and reorganized. A better organizational scheme might be one similar to that of Chapter 18B, establishing the Department of Social Services. A first section could simply announce the establishment of the Department, a second section could describe its function and purposes, a third section could enumerate the Department's services, and a fourth section could deal with the appointment, qualifications, powers, and duties of the Commissioner.

In the second sentence of the first paragraph, the reference to "council" should specify which council is being referred to.

The second sentence of the second paragraph should be rewritten to make clear that the appropriations are given to the Department to expend. As the sentence now stands it could be read as stating that the grants go directly to cities, towns, and other agencies who in turn funnel it to the Department.

The material in the second paragraph should probably be the subject of a separate section.

Ch. 18A, sec. 2

Section 2 functions essentially as an "enumeration of services" statute, and provides that the Department shall do the following things:

- provide a comprehensive and coordinated program of delinquency prevention as well as services to delinquent juveniles who have been referred or committed to the Department by the courts;
- provide community services for the prevention of delinquency through (1) its own staff, (2) through grants to cities, towns, and other public agencies, and (3) through purchase of services from private nonprofit agencies;
- provide services and facilities for the study, diagnosis, care, treatment, education, training and rehabilitation of all juveniles referred or committed; and,
- maintain a program of research into the causes, treatment, and prevention of juvenile delinquency, including research into new methods of service and treatment.

In serving delinquent youth the Department will cooperate with other state and local agencies, both public and private.

Comment: This section should be rewritten in a way that lists the range and types of services that the Department provides and more clearly distinguishes between them.

Ch. 18A, sec. 3

Section 3 states that the Commissioner shall appoint, with the approval of the Governor, a Deputy Commissioner, who will not be subject to the provisions of either Chapter 31 (Civil Service) or of section 9A of Chapter 30 (Veterans holding unclassified positions; separation from state service). The Deputy Commissioner must possess the same qualifications as the Commissioner, except that he must have had only five years of experience in work related to juvenile delinquency, of which at least two must have been as an administrator. The Deputy Commissioner serves at the pleasure of the Commissioner, and is required to devote his full time during business hours to the duties of his office. He exercises such authority and discharges such duties of the Commissioner as the Commissioner may delegate to him from time to time. In the absence or incapacity of the Commissioner, or in the event of a vacancy in the office of the Commissioner, the Deputy Commissioner acts as the Commissioner until the absence or incapacity has terminated, or until the vacancy has been filled.

Comment: This section is well drafted and not in need of structural revision.

Ch. 18A, sec. 4

Section 4 provides for the establishment of four bureaus:

(1) The Bureau of Clinical Services;
(2) The Bureau of After-care, Delinquency Prevention and Clinical Services;
(3) The Bureau of Education; and,
(4) The Bureau of Institutional Services.

Each Bureau is under the direction of an Assistant Commissioner. Each Assistant Commissioner is appointed by the Commissioner, and these positions are not subject to Chapter 31 (Civil Service) or section 9A of Chapter 30 (Veterans holding unclassified positions; separation from state service).

Comment: This section should be revised in accordance with current needs and practices.

Ch. 18A, sec. 5

The first paragraph of section 5 provides that upon commitment or referral the Bureau of Clinical Services shall do the following things:

- review the social histories and diagnostic data of all persons referred or committed to the Department;
- conduct such further study and evaluation as may be required for clinical classification; and,
- place referred or committed persons under an appropriate form of care.

The Bureau is also required to:

- conduct the research and planning necessary for the continued care of each youth within the jurisdiction of the Department; and,
- develop and implement effective individualized treatment programs for each of the delinquent juveniles committed to the Department.

The Bureau is responsible for all case assignments, case reassignments, case dispositions, and proposals for discharge, as well as for reviewing existing case assignments in the Department.

The Bureau has the reponsibility for operating the following facilities:

- the Reception-Detention Center for Girls at Boston;
- the Judge John J. Connelly Youth Center at Boston;
- the Westfield Detention Center at Westfield; and,
- the Worcester Detention Center at Worcester.

Subject to appropriation, the Bureau will also operate such other centers (1) as may be necessary for the diagnosis of childrens needs upon commitment or referral, and (2) as may be necessary for temporary shelter care in emergency cases, including those of children requiring secure custody.

The second paragraph of section 5 states that the Commissioner shall appoint an Assistant Commissioner for the Bureau who shall have a graduate degree from an accredited institution in psychology, social work, medicine, or related fields, with a specialty in youth-related problems. The Assistant Commissioner must have had at least five years of professional and clinical experience working in the field of emotionally disturbed youth at the time of his appointment. He may, notwithstanding any contrary provisions of law, be allowed such professional affiliations concurrent with his duties as the Commissioner may approve, including the holding of a nontenure appointment at a University. The Assistant Commissioner shall, with the approval of the Commissioner establish and maintain standards for all clinical and child care positions in the Department, and he shall review the qualifications and performance of all clinical and child care personnel. The Commissioner appoints replacement or additional clinical and child care personnel upon the recommendation of the Assistant Commissioner, together with the Assistant Commissioner of any other Bureau requesting such personnel.

Comment: The first paragraph of this section would be better if rewritten as an enumeration of services section.

The second paragraph might be better if severed from the first paragraph and made into a separate section.

Ch. 18A, sec. 5 (con't)

In the fourth sentence of the first paragraph the commas following "Judge J. Connelly Youth Center" and "Westfield and Worcester Detention Center" should be replaced by the word "at."

Also in the fourth sentence, a comma should be added after the phrase "and subject to appropriation."

Also in the fourth sentence, the phrase "including those children" should be amended to read "including those of children."

In the second sentence of the second paragraph, the phrase "professional and clinical experience" should be amended to read "professional or clinical experience." Notice that this amendment makes the language consistent with the language of the third sentence of the first paragraph of section 1, where it states that the Commissioner is required to have seven years of "professional or administrative" experience.

In the last sentence of the second paragraph, the term "replacement or additional" should be deleted. As it now stands the section suggests that the Commissioner could not have appointed the original clinical and child care personnel.

More importantly, this section should be revised in accordance with current need and practice.

Ch. 18A, sec. 6

The first paragraph of section 6 states that the Bureau of After-care, Delinquecy Prevention and Community Services is responsible for the noninstitutional programs of the Department, including but not limited to the following programs:

- foster home care;
- group home care;
- after-care services to children in their own homes;
- the after-care investigation services unit; and,
- parole and educational counselor programs.

The Bureau is responsible for all of the following:

- developing alternatives to institutional care;
- working with families of children in institutions in order to facilitate their return home and their adjustment and integration into the community;
- continuing consultation with other state agencies and with local community groups and agencies for the development of preventitive programs;
- the conduct of grants-in-aid for the initiation, demonstration, and development of programs; and,
- the school adjustment counselor program.

The second paragraph of section 6 states that the Commissioner shall appoint an Assistant Commissioner for the Bureau of After-care, Delinquency Prevention and Community Services who shall have earned a graduate degree from an accredited institution in the social sciences, education, or related fields. The Assistant Commissioner must have had at least five years of professional experience in delinquency prevention and after-care, with at least two of those years having been spent in an administrative capacity. The Assistant Commissioner serves at the pleasure of the Commissioner.

Comment: In the first sentence of the first paragraph, the word "the" should be inserted before the phrase "after-care investigation services unit."

In the same sentence, the word "and" should be inserted before the phrase "parole and educational counselor programs."

In the last sentence of the first paragraph a comma needs to be inserted after the phrase "demonstration and development of programs."

All references to "after-care" should probably be amended to read "aftercare."

Additionally, this section should be revised in accordance with current needs and practices.

Ch. 18A, sec. 7

The first paragraph of section 7 provides that the Bureau of Education is responsible for the following things:

- establishing and maintaining programs and curricula for the educational services function of each institution of the Department;

- coordinating educational services for individual youths at each stage of departmental jurisdiction;

- establishing and maintaining academic and vocational educational programs, curriculum development plans, teacher training programs and library services for (1) each of the institutions of the Department, and (2) each of the youth committed to the Department;

- seeking out and implementing federally aided educational programs; and,

- developing and initiating in-service training programs for all employees in each of the institutions and facilities within the jurisdiction of the Department, after consultation with the Commissioner and the Assistant Commissioners of the other Bureaus, or their designees.

Training programs require the approval of the personnel administrator in accordance with the provisions of G.L. c. 7, s. 28.

The second paragraph of the section states that the Commissioner shall appoint an Assistant Commissioner for the Bureau of Educational Services, who shall have earned a graduate degree from an accredited institution in education, the social sciences, or related fields, and who shall have a specialty in problems relating to delinquency. This Assistant Commissioner must have had at least five years professional experience in public or private secondary education, teaching in the area of delinquency prevention or teaching delinquent youth, with at least two of those years spent in an administrative-curricula planning capacity.

Ch. 18A, sec. 7 (con't)

The Assistant Commissioner has the following responsibilities:

- with the approval of the Commissioner, to establish and maintain standards for all teaching positions in the jurisdiction of the Department and to review the qualifications and performances of all teaching personnel in the Department;
- in conjunction with the Assistant Commissioners of other Bureaus requesting replacement and additional teaching personnel, to make recommendations to the Commissioner relative to the replacement and addition of all teaching personnel for the institutions and facilities under the jurisdiction of the requesting Bureaus.

Comment: The word "plants" in the second sentence of the first paragraph should almost certainly be "plans."

In the second sentence of the second paragraph the word "an" should be inserted before the phrase "administrative-curricula planning capacity."

Again, this section should be revised in accordance with current needs and practices.

Ch. 18A, sec. 8

The first paragraph of section 8 provides that the Bureau of Institutional Services is responsible for operating the following facilities:

- the Residential Treatment Unit at Oakdale;
- the Lyman School for Boys;
- the Industrial School for Boys;
- the Industrial School for Girls;
- the Institute for Juvenile Guidance at South Bridgewater; and,
- the Stephen L. French Forrestry Camp at East Brewster.

The Bureau is responsible for all programs within the institutions of the Department except fot those programs which are primarily clinical or educational, and shall from time to time evaluate these programs to determine their effectiveness. The Bureau shall coordinate programs between institutions and between institutions and other programs of the Department, to assure effective continuity in the rehabilitative process.

The second paragraph of the section provides that the Commissioner of Youth Service shall appoint an Assistant Commissioner for the Bureau who will have earned a graduate degree from an accredited institution in the social sciences, education, or related fields. The Assistant Commissioner shall have had at least five years professional experience working with delinquent children in an institutional setting, with at least two of these years having been spent in an administrative capacity. The Assistant Commissioner shall from time to time make recommendations to the Commissioner concerning major alteration, renovation, expansion, relocation or replacement of existing institutions or camps, and the construction of additional institutions or camps.

Comment: This section should be revised in accordance with current needs and practices. Of the institutions the Bureau was mandated to operate, only the Forrestry Camp at Brewster is still in existence.

Ch. 18A, sec. 9

The first paragraph of section 9 provides that there will be in the Department an Advisory Committee consisting of the following people:

- the Commissioner of Youth Services;
- the Commissioner of Mental Health;
- the Commissioner of Education;
- the Chairman of the Parole Board;
- the Commissioner of Correction;
- the Commissioner of Probation;
- the Commissioner of Rehabilitation;
- the Chairman of the Massachusetts Commission Against Discrimination;
- the Executive Secretary of the Massachusetts Committee on Children and Youth;
- the Executive Secretary of the Massachusetts Society for the Prevention of Cruelty to Children; and,
- nine other persons who shall be appointed by the Governor. All of the appointive members are required to have demonstrated professional involvement and expertise in the area of delinquency prevention, rehabilitation, and treatment. The ten nonappointive members shall all serve "ex officiis" (by virtue of the office).

Upon the expiration of the term of office of any appointive member a successor shall be appointed for a term of three years. Any vacancy shall be filled by the Governor for the unexpired term.

The Governor shall appoint a Chairman and a Vice Chairman from the members of the Committee.

The Committee may appoint a full time Executive Secretary for itself.

Members of the Committee serve without compensation, but each member shall be reimbursed for all reasonable expenses incurred in the performance of his or her official duties.

The second paragraph of the section provides that the Advisory Committee shall have the following duties:

(a) advise the Commissioner of policy, program development, and priorities of need in developing a comprehensive program (1) for the treatment, rehabilitation, and custody of juvenile offenders, and (2) for integration of the juvenile offender into constructive community life;

(b) review the annual plan and the proposed annual budget for the Department, and make recommendations to the Commissioner relative thereto;

(c) advise on the recruitment policies of schools in the Department;

(d) submit an annual report in which the Committee may (1) propose legislation, and (2) present material for the education of the public; and,

(e) visit, at its discretion, every institution and facility within the jurisdiction of the Department.

The Committee shall meet at least four times a year and shall convene special meetings at the call of the Chairman of the Committee, of a majority of the Committee, or of the Commissioner of Youth Services. For the purposes of holding a meeting and conducting official business, a majority of the committee shall constitute a quorum.

A written record of all meetings of the Committee must be maintained by the Executive Secretary, who must file a copy of the written record with the Commissioner of Administration and Finance within fifteen days after the date of each meeting.

Ch. 18A, sec. 9 (con't)

Comment: In the first sentence of the first paragraph, the phrase "in the department an advisory committee" should be rewritten as "an advisory committee to the department."

The third sentence should be rewritten to provide that the term of office of an appointive member shall be three years. As the sentence is now written it specifies the duration of successor appointments without specifying the duration of the original appointments.

In the first sentence of the second paragraph, a comma is needed after the phrase "custody of juvenile offenders."

The fifth sentence of the second paragraph the words "institution and" needs to be deleted.

The last sentence of the second paragraph, providing for the mandatory filing of a written record of meetings of the Committee by the Executive Secretary, seems to be at odds with the sixth sentence of the first paragraph, which makes the appointment of an Executive Secretary discretionary as to the Committee.

GENERAL COMMENTS:

Sections 5 through 8 repeat in each instance that the Assistant Commissioner of each Bureau shall serve at the pleasure of the Commissioner. This would be better placed in section 4, since it applies to all of the Assistant Commissioners uniformly.

Sections 5 through 8 could each be broken into two separate sections, with the first section in each case enumerating the services, powers, and duties of the various Bureaus, and with the second section in each case enumerating the qualifications, power and authority of the appropriate Assistant Commissioner.

As a general rule of grammar, in a series of three or more terms with a single conjunction, a comma should be placed after each term except the last. The language of this statute frequently fails to place a comma after the second-to-last term as well. Thus, in the first sentence of the second paragraph of section 9, the phrase "advise the Commissioner of policy, program development and priorities of need" should be rewritten to read, "advise the Commissioner of policy, program development, and priorities of need." In the same sentence, the phrase "treatment, rehabilitation and custody" should read, "treatment, rehabilitation, and custody." While the placement of commas may seem to be a trivial matter, from a drafting point of view it is extremely important in delineating exactly which items are disjunctive parts of an enumerated series, and which are conjunctive.